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Probate & Fiduciary Litigation Newsletter - December 2021

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This newsletter is intended to keep readers informed about developments in probate and fiduciary litigation in Massachusetts and New York. Our lawyers are at the forefront of this area of the law, shaping how it is handled in the Probate and Family Court. Goulston & Storrs is the go-to firm in the Northeast for litigation involving Probate and Fiduciary matters.

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Daughter with Power of Attorney Had Burden to Show No Undue Influence over Father

Coscia v. Sweezey, 2021 WL 4765696 (Mass App. Ct. October 13, 2021)

Does holding a power of attorney from a parent in declining health put an additional burden on the power holder to demonstrate in probate court that the decedent was fully informed in making changes to his estate plan? In *Coscia v. Sweezey*, a Massachusetts appellate court answered that question in the affirmative.

Before 2013, the decedent (Russell) stated that he wanted to leave the family home to his five adult children. In December 2013, Russell suffered a stroke which caused memory loss and a change in his behavior. His daughter (Laura) returned to Massachusetts to care for Russell whom she described as "mentally incapacitated." In September 2014, at Laura's suggestion, Russell executed a durable power of attorney appointing Laura as his attorney-in-fact. Russell was later diagnosed with Alzheimer's disease.

In 2015, Laura took Russell to an attorney's office for the purpose of executing trust documents. The attorney met with Russell alone for ten to fifteen minutes. Although Russell's medical records showed that he had "mild dementia with significant deficits in multiple domains," the attorney concluded that Russell was lucid and understood the terms of the trust document. The trust identified Russell as the settlor of the trust and Laura as the sole trustee and beneficiary. Pursuant to the estate plan, Russell executed the documents creating the trust and transferring the family home to Laura as trustee by quitclaim deed.

After Russell died, his other children challenged the trust as void due to undue influence by Laura. The Probate and Family Court judge agreed, reasoning that Laura had failed to prove that Russell was not subject to undue influence. On appeal, Laura argued that the judge improperly shifted the burden of proof to her. The appellate court affirmed, stating that the burden of proof shifts for "one who serves as a fiduciary under a power of attorney; was fully involved in all the undertakings relative to the revisions of the testator's will and estate plan, yielding the beneficial inheritance;

and exercised unrestricted and expansive power over the testator's finances… Therefore, it was Laura's burden to establish that the transaction was fair and that Russell was fully informed." The court found that Laura had failed to carry this burden.

Takeaway: We have previously noted the difficulty of proving undue influence where, as here, an attorney supervises the document's preparation and is satisfied as to the decedent's mental capacity. It is important to bear in mind that that may not be enough where the decedent is accompanied by and following the plan of someone holding power of attorney, making them a fiduciary. In such a case, additional steps should be taken to make a record that, at the very least, the person executing the document is fully informed.

Decedent's Lack of Facility in English Creates Factual Issue as to Due Execution of Will

Matter of Sook Li, 72 Misc.3d 988 (Queens Surr. July 20, 2021)

Can proof of a decedent's lack of facility in English create a factual issue requiring trial as to the due execution of the will? In *Matter of Sook Li*, the Surrogate's Court answered that question in the affirmative.

Decedent died in 2017 at the age of 89, survived by three children. Her will, executed in 2013, left nominal amounts to two of her children and left the estate's main asset, a three-family house in which all parties had resided with the decedent, to one child (Sau). An earlier will from 2006, which Sau witnessed, left the estate to the three children equally. One of Sau's siblings contested the 2013 will on various grounds, including lack of due execution. The executors (Sau and the third sibling) moved for summary judgment dismissing the objections.

The 2013 will was prepared by an attorney who also supervised its execution. The will was duly executed and initialed on each page by the decedent, and contained an attestation clause and the signatures of two witnesses, who also provided affidavits. But the objecting sibling offered evidence that the decedent was unable to read or speak English, and neither the attorney nor the witnesses were able to recall having communicated in English with the decedent. No interpreter was provided. There was also evidence that the attorney communicated with Sau regarding the terms of the will rather than directly with the decedent.

The court noted that a testator's "lack of facility with the English language is not 'an insuperable barrier' to a finding of due execution," but that "where a testator is not fluent in English, there is the possibility that the testator may not have known the contents of what was being signed, or understood the significance of what was transpiring at the time, and, therefore, there is a greater burden in establishing that… the instrument executed… expresses the testator's will." The court found that the evidence, "especially the documentary evidence from disinterested parties pertaining to the decedent's lack of facility with English," raised factual issues for trial, and denied the executors' summary judgment motion.

Takeaway: The preparation and execution of wills for persons not fluent in English should be accompanied by extra steps, in particular the use of an interpreter, documenting that the maker of

the will understood what she was signing. In *Sook Li*, the will was prepared by an attorney who also supervised its execution, but the language issue led to the need for a trial as to the validity of the will.