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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. P-483-11

IN THE MATTER OF THE ESTATE OF EDITH WEINER, DECEASED

CIVIL ACTION

DECISION FOLLOWING TRIAL

Appearances:

V. Anthony Digirolamo, Esq. and Lisa M. Fittipaldi, Esq. (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, P.C.) on behalf of Petitioners Craig Weiner and Lynne Weiner.

Thomas N. Torzewski, Esq.and Jennifer McInerney, Esq. (Thomas N. Torzewski LLC) on behalf of Respondent Executor Scott Weiner

Decided: February 12, 2013 Corrected: March 5, 2013

CONTILLO, P.J. Ch.

This matter was tried by the court sitting without a jury on January 28, 29 and 30, 2013, with supplemental argument on February 6, 2013, following which the court reserved decision.

I. BACKGROUND AND PROCEDURAL HISTORY

Edith Weiner ("Decedent" or Edith") died testate on April 15, 2011, survived by her three children, Craig Weiner ("Craig"), Lynne Zaikov ("Lynne") and Scott Weiner

("Scott"). Edith was 93 years old at the time of her death. She had been living at the Jewish Home in Rockleigh, New Jersey for a few months before her death. She had resided with her son Scott at his home in Harrington Park since relocating to New Jersey in approximately March of 2006. Her Last Will and Testament ("Will") was executed on December 11, 2006 (J-1). That instrument is challenged by the Plaintiffs, who allege it is the product of undue influence by Scott. The Will was admitted to Probate by the Bergen County Surrogate on May 26, 2011, and Letters Testamentary were issued to Scott.

Pursuant to the terms of her Will, Edith left all of her personal property to her three children "as they may devise and agree to take". (J-1), Article Second. To Scott Edith devised, if he survived her, her property in Sea Isle City, New Jersey. Article Third. That devise lapsed should Scott fail to survive Edith. Edith bequeathed $1,000 to each of her grandchildren, outright, and bequeathed a $100,000 to her son Craig. In addition, Edith left bequests to the following individuals:

Gary DeWald	$ 3,000
Rose Bell	$ 5,000
Charles Finkel	$ 5,000
Stanley Finkel	$ 5,000

Id. In the event son Scott survived her, Edith bequeathed her residuary estate to her children Craig and Lynne, per stirpes. Article Fifth.

In the event son Scott predeceased Edith, the $100,000 bequeathed to son Craig lapses, and all of Edith's residuary estate passes to her descendants surviving her, per stirpes. Article Fifth.

A Trust for minors or incompetents is created. Article Sixth. Scott is named Executor. Lynne's husband, Martin Zaikov, is alternate Executor. Scott is named trustee of any trusts established pursuant to the Will. Martin Zaikov is alternate Trustee.

A controversy arises as a result of a Fourth[1] Amended and Restated Edith Weiner

1 And final.

Trust Agreement executed by Edith on December 8, 2003. While the 2006 Will purports to give the Sea Isle City property to Scott, that property was titled in the name of an irrevocable trust executed by Edith in 1996 (J-2), implemented by deed from Edith to the Trust dated April 19, 1996 (J-7), and reaffirmed by Edith in four (4) subsequent iterations of that Trust (J-3, J-4, J-5 and J-6) , the last being executed on December 8, 2003 (J-6).

Plaintiffs Craig Weiner and Lynne Zaikov filed a Verified Complaint to set aside the Will on December 23, 2011. Craig and Lynne assert undue influence upon Edith by Scott Weiner (First Count) and that the Will should be set aside because of fraud, deceit or mistake or because of Edith's probable intent. (Second Count). Scott filed an Answer on February 14, 2012. On March 5, 2012, Scott filed a Counterclaim For Advice and Direction regarding the conflict between the Trust and the Will with respect to the Sea Isle City property.

A Case Management Conference was held, yielding a Case Management Order dated February 24, 2012, which set a discovery timetable and a trial date. The parties attempted mediation, which proved unsuccessful.

The fundamental trial issue may be framed as follows: Is Edith's testamentary devise of the Sea Isle City property to her son Scott the result of undue influence, and, if not, is it effective in view of the fact that Edith had previously conveyed that property into a revocable trust a decade prior to the execution of the Will, and therefore did not own it at the time of her death?

The case of plaintiffs Craig Weiner and Lynne Zaikov was presented by V. Anthony Digirolamo, Esq. and Lisa Fittipaldi, Esq. of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, P.C. The defendant-executor Scott Weiner's case was presented by Thomas N. Torzewski, Esq. and Jennifer McInerney, Esq. of Thomas N. Torzewski, LLC.

The following witnesses were called by plaintiffs:

1. Plaintiff Craig Weiner
2. Plaintiff Lynne Zaikov

3. Pamela Weiner (wife of Craig Weiner)

4. Martin Zaikov (husband of Lynne Zaikov)

5. Andrew Cevasco, Esq.

The defendant-executor called the following witness:

1. Defendant-Executor Scott Weiner

Numerous exhibits were received into evidence. In addition, portions of the deposition transcripts of Craig Weiner, Scott Weiner and Andrew Cevasco, Esq. were accepted into evidence.

At the conclusion of the plaintiffs' case, plaintiffs moved to shift the burden of proof to the defendant Scott Weiner, i.e., to shift to the Will's proponent the burden of proving by a preponderance of the evidence that there was no undue influence. The defendant cross-moved to dismiss. For the reasons set forth by the court on the record, defendant's motion to dismiss was denied, and plaintiffs' motion to shift the burden of proof to the defendant was granted: the court determined that a confidential relationship existed between the testatrix Edith Weiner and her son Scott Weiner – with whom she resided and who benefits disproportionately under the Will - and that suspicious circumstances attended the alternation of Edith's estate plan reflected by that Will.

II. FURTHER FINDINGS AND CONCLUSIONS

Edith and her husband Albert Weiner acquired the Sea Isle City property in 1951. Albert passed away in 1988. Edith resided in Florida from 1974 until 2006. Son Craig has been a Florida resident since 1970 to 2006, when he moved to South Carolina, where he continues to reside. Scott has been a Bergen County New Jersey resident since 1994. Lynne has resided in Bergen County New Jersey since 1967.

On April 19, 1996, while a Florida resident, Edith created the Edith Weiner Revocable Trust, drafted by Florida attorney Linda Chambliss. Among her assets she placed in that Trust was the Sea Isle City property. By deed of the same date, recorded October 2, 1996, Edith conveyed the Sea Isle City property to the Trust. Pursuant to the provisions on pages 4

and 5 of the Trust, Edith devised the Florida condominium in which she resided to her son Craig. She also gave her son Scott the right to purchase the Sea Isle City property for 80% of its date of death appraised value. All remaining assets within the Trust were to be distributed to her issue, per stirpes, upon her death.

On April 3, 2000, Edith signed the Amended and Restated Edith Weiner Revocable Trust Agreement (J-3).

Approximately eight months later, on December 18, 2000 Edith amended her Trust Agreement again by signing the Second Amended and Restated Edith Weiner Revocable Trust Agreement.

Less than two weeks later, Edith amended the Trust Agreement once again by signing the Third Amended and Restated Edith Weiner Trust Agreement on December 29, 2000.

Edith executed the Fourth (and final) Amendment to her Trust Agreement on December 8, 2003.

There is no challenge to any of the Florida testamentary documents.

The varying provisions of these amendments are discussed in detail below.

III. DECISION OF THE COURT

(A) UNDUE INFLUENCE

Having listened to all the testimony and reviewed all the evidence, the court has determined that the defendant-executor Scott Weiner has failed to rebut the presumption that the Last Will and Testament of Edith Weiner of December 11, 2006 is the product of undue influence, i.e., has failed to establish by a preponderance of the competent evidence that the Will was not the product of undue influence. I therefore set that Will aside as invalid, void and of no cause or effect.

Edith Weiner executed that Will at the age of 88 years. She did not at that time lack the capacity to create a testamentary plan, or to execute a valid last will and testament. A very low degree of capacity will suffice under the law. In Re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999); In Re Liebl, 260 N.J. Super. 519 (App. Div. 1992). The strong

presumption in the law is that a testatrix has the required testamentary capacity, competence and soundness of mind. Haynes v. First Nat'l Bank, 87 N.J. 163, 176 (1981). That presumption in favor of capacity has not been overcome and, indeed, no claim of lack of capacity was advanced at the trial.

However, the credible evidence clearly established that at the time she came to formulate and execute the Will of December 11, 2006, Edith Weiner was physically and mentally in steep decline, as circumstances had conspired to weaken her capacity to live and act independently. She was, at the time of that Will, in an enhanced state of dependence and susceptibility to the influence of others upon whom she was required to repose great trust and confidence.

Edith Weiner and her husband Albert acquired a residence at the Jersey Shore in Sea Isle City in 1951. They had three children – the two plaintiffs, Craig and Lynne, and the defendant, Scott. Edith and her husband lived part of the year in Florida as well, starting in and around 1974. The witnesses characterized the couple as "snowbirds". Albert died in 1988, at which time Edith established herself as a permanent Florida resident, with annual trips to her Sea Isle City home.

Edith absorbed the loss of her husband and managed in time to create an independent life for herself in Lauderhill, Florida, residing in a condominium complex there. She had an extensive network of friends. She dated. She drove her own automobile. She had a variety of interests and, overall, a rich and vibrant life.

Edith's son Craig, and Craig's wife Pam, also lived in Florida, since 1970. The residences of mother and son were near to each other. The relationship of Edith and Craig was very close. Craig assisted his independent mother with such tasks as she might require, such as by driving her beyond the circumference she felt comfortable driving herself. She dealt with her three adult children on terms of equality and independence.

Hurricane Wilma struck Florida in October, 2005. Edith's unit suffered heavy water and wind damage, and resulting mold contamination. The unit was uninhabitable. With that

storm, Edith lost her home, her social network and a substantial measure of her independence. She became depressed over the loss of her home, and had to move in with Craig and Pam. Craig provided a trailer adjacent to his home so Edith could have a modicum of independence and separate living space.

Then, within about four months of the hurricane, Craig relocated from Florida to Myrtle Beach, South Carolina, for job reasons. Craig's wife stayed behind in Florida, with Edith, readying their home for sale, whereupon she then joined her husband in South Carolina. It was decided then that Edith would move in with her son Scott and his wife and children in Harrington Park, New Jersey. Scott and his wife both worked full time, but had a full time housekeeper and, apparently, sufficient space in their home, which they opened to Edith. Two towns away from Scott - in Alpine - lived Edith's daughter – Lynne – and Lynne's husband, Martin Zaikov.

The balance of the credible evidence is that this move from Craig's home to Scott's took place sometime in March, 2006.

Some time in March or April of 2006, Edith was staying at Lynne's home in Alpine, while Scott and his wife were away. Edith suffered a second calamitous event, following some five or six months on the heels of the loss of her home in Florida and her uprooting from Craig's home in that state. Edith fell in Lynne's bathroom, breaking her hip. She was operated upon, went through rehabilitation, and walked with a walker, or sometimes a cane, for the rest of her life.

Edith's life was now sharply circumscribed. She was fortunate to be living in her son Scott's home, with the benefit of Scott and his family's company, as well as of having her daughter and the daughter's husband nearby. But her life was now transformed. She had no friends in New Jersey, and no acquaintances. She could no longer drive her car. Any thoughts of independent living – at the Sea Isle City home or elsewhere – were now gone. She grew out of necessity to be very dependent on Scott, for the roof over her head and the food that she ate. Long accustomed to helping his mother with her finances, Scott now took

a more active role, essentially managing his mother's financial affairs. He took the laboring oar in finalizing the sale of her Florida condo, and gathered up and brought to New Jersey all of her records and papers, including those of the Trust she had established while she lived in Florida.

Within four (4) months of commencing residency in Scott's home in New Jersey, Edith was meeting with a New Jersey attorney recommended by Scott and his wife, and undertaking to create a substantially revised testamentary plan that left the Sea Isle City home to Scott, free and clear, thereby creating a strikingly unbalanced estate plan which favored Scott, at the expense of his siblings, to an unprecedented extent. This plan was a marked departure from all prior versions of Edith's estate plans.

According to Scott, Edith told him that because of his longtime love and attention to the Sea Isle City house, she wanted him to have it when she died. This conversion is said to have occurred in June of 2006. Edith said she wanted him to find a lawyer so she could make a Will that left the shore house to him. Scott's wife worked for a company that sends temporary workers to law firms. From that connection, local attorney Andrew Cevasco, Esq. was recommended. Edith did not make the appointment with the attorney; Scott did. Edith did not discuss the Estate, initially, with the law firm; Scott did. He discussed the matter with an associate of Cevasco on July 16 or 17, 2006 (J-9, J-8). Scott advised this associate that "Her health, both physically and mentally, is apparently starting to deteriorate…". J-8. Scott advised that the shore house was worth between $1.2 and $1.5 million, and that there were securities worth between $500,000 and $700,000 (J-8). Scott further advised the attorney of the fact that his mother had created a Revocable Living Trust and had a Will while she lived in Florida, and that some of her assets had been transferred to this Trust. (J-8). The associate told Scott to send him a copy of the Will and Revocable Living Trust, "… as well as a copy of the Deed to the personal residence (if available) and copies of any and all brokerage statements" regarding the mother's securities. (J-8).

The next day, Scott sent the associate a letter (J-9) forwarding "… the most current

copy of the Trust Agreement[2], a list of liquid assets, and a copy of most [sic] current tax bill from her house in Sea Isle City, New Jersey".

At trial, Scott explained that he did not send the attorney a copy of his mother's Florida Will, nor a copy of the deed to the Trust of the Sea Isle City property, both of which the attorney had specifically requested, because they were not among his mother's papers in Harrington Park. Scott did not call his brother Craig in order to get a copy of either document, nor inquire of his sister, nor did he call his mother's Florida attorney, Marvin C. Gutter, Esq., of whose existence he was aware (J-28), to get a copy of the Florida Will or a copy of the Sea Isle City deed into the Trust. According to Scott, he never advised either his brother or his sister that he was taking the mother to a New Jersey attorney to change her Will to leave the Sea Isle City property to him, because "she (Edith) did not want anyone to know about her finances". Scott's desire not to alert Craig or Lynne to the contemplated modification, to his siblings' detriment, to Edith's estate plans explains, I find, Scott's disinclination to call his brother, or his sister, or the mother's Florida attorney, to get a copy of the Florida deed or the Florida Will which the New Jersey attorney had asked him to get.

Scott, I find, knew at the time of the commencement of the dealings with the New Jersey attorney that he – Scott – was not inheriting the Sea Isle City house under the existing instruments created by Edith when she lived in Florida.

Scott drove Edith to Cevasco's office and he and his mother met with the attorney. Scott was present for the initial ten or fifteen minutes or so, during which Edith told the attorney she wanted Scott to get the Sea Isle City property for himself. At that point – cognizant of the unequal division of estate assets – favoring Scott – that Edith was saying she wanted, the attorney asked Scott to step in the waiting area while he met separately with just Edith, for about an hour, taking detailed notes (J-10). The attorney became satisfied that Edith was competent, although he did counsel her to get a doctor's certification to help defend against a competency attack should one develop.[3] The attorney likewise satisfied

2 The Fourth Amended Restated Edith Weiner Trust Agreement – the final iteration.
3 No such certification was secured.

himself that Edith understood what she was doing. At trial he testified that Edith did not appear to be under the influence of anyone.

In this regard, the court notes that it has never seen a scrivener of a Will testify that his client had lacked capacity to execute the Will the client signed. In this case, there is no claim of utter lack of capacity. The claim, rather, is that Edith was afflicted with a markedly diminished capacity – physically and psychologically – and that state rendered her vulnerable to undue influence. The New Jersey attorney had no prior dealings with Edith. He was not the author of the multiple variations of her estate plan dating back to 1996. As such, he had no yardstick with which to measure or compare the Edith before him to the Edith who existed prior to the recent loss of her home in a hurricane and prior to her dislocation in and from Florida, nor the Edith who existed prior to her recent fall and broken hip. Indeed, it does not appear that the attorney was even made aware of these calamities, nor of the heavy toll they had taken on Edith.

Moreover, it does not appear that the scrivener was at all aware of the striking extent to which the instrument the client said she wanted differed from her existing testamentary plans. He was not provided with the original Trust, nor the first three Amendments, and apparently did not review the fourth Amendment, as he did not account for the Trust in the testamentary plans he prepared for Edith.

Undue influence is only rarely detectable by overt acts. It is never videotaped. It is almost always subtle, dependent upon inferences from the facts. That an attorney presented with a new, elderly client failed to detect influence or undue influence is not all uncommon or surprising to the court.

When the attorney subsequently sent Edith a draft of the Will and Power of Attorney to review, it was returned to the scrivener with corrections and annotations, not in Edith's hand but in Scott's. The end result, executed by Edith on December 11, 2006, is a markedly unbalanced distribution of Edith's estate, and a dramatic departure in favor of Scott from any and all of her prior testamentary plans. Using values as of the date the Will was executed,

Scott became entitled to an asset worth between $1.2 M and $1.5 M – the Sea Isle City property. (J-8). This specific bequest to Scott is outright. Craig gets $100,000 and 50% of the residuary estate. (Article Fourth). Lynne gets 50% of the residuary estate. Edith's total asset pool excluding Sea Isle City was thought to be worth between $500,000 and $700,000 (J-8), meaning Craig would inherit $100,000 plus one half of between $400,000 and $600,000, or a grand total of $300,000 to $400,000; Lynne would receive between $200,000 to $300,000.[4]

Any and all estate taxes, debts, expenses, commissions and attorneys fees would be taken off the top, thereby diminishing further the inheritance of Craig and Lynne, but not of Scott.

In my view, when evaluating Edith's intentions in light of the allegations of undue influence, the most relevant time is the time the Will is created, and what Edith then thought her assets were worth. But the marked imbalance described above is not qualitatively different if one looks at date of death values (April 15, 2011) as opposed to date of Will values (December 11, 2006). At date of death Sea Isle was worth $1,166,000.00 (D-19). The total value of other assets titled in the name of the Florida trust at date of death was but $397,700.00. (D-19). Other assets, including joint accounts set up after Edith moved in with Scott, and assets in her own name individually, totaled $458,301.[5]

This means that, upon Edith's death, Scott inherits an asset worth $1,166,000 – free and clear, and Craig receives $100,000, plus half of, at most, $756,000, i.e., a total of $478,000; Lynne receives $378,000. Craig's inheritance and Lynne's are further reduced, dollar for dollar, for all estate taxes and expenses of administration, including debts, commissions and accounting and attorneys' fees. That residuary estate was also exposed to further reduction as a result of two joint CD's set up by or on behalf of Edith after taking up residency with Scott, using Trust assets, totaling $111,000 (J-9). However the defendant-

4 There were also some miscellaneous bequests totaling $18,000 (Article Fourth) which have not been factored in the analysis for the sake of simplicity.

5 Excluding jewelry worth about $38,000 (D-20).

executor has taken the position in this litigation that these are Edith's assets, to be made part of the residuary estate.

Finally, under the 2006 Will, Scott is made the sole executor as well as the sole trustee of any trusts established thereunder, with Lynne's husband, Martin Zaikov as alternate executor and trustee, a fact never disclosed to Edith's son-in-law. While Edith was the Trustee of the Edith Weiner Revocable Trust during her lifetime, all three children – Lynne, Craig and Scott - were Co-Trustees upon her death or incapacity. (J-2, Article II (A) and Edith's Florida Will, December 8, 2003, naming all three of her children as her Personal Representatives (J-29)). The designation of fiduciaries in the 2006 Will, then, is another instance of a departure from Edith's prior testamentary plans, in place and reinforced four times, over ten years, now in favor of Scott, at the expense of his siblings.

Now, no testatrix is required to divide her estate equally among her children; indeed, she may exclude from her estate one or more or all of her children. Benedict v. New York Trust Company, 48 N.J. Super. 286, 209 (Ch. Div.) aff'd per curiam, 50 N.J. Super. 177 (App. Div. 1958). And in the matter of Edith Weiner, she never, in any of the multiple iterations of her estate plan dating back to 1996, treated her children with scrupulous equality. She also emphasized to attorney Cevasco that she did not feel obliged to give to Craig, Lynne and Scott, equally.

However, I find that Scott has failed to demonstrate that the document Edith put her signature to on December 11, 2006 – the disputed Will – was free from undue influence exercised by him upon her in her markedly diminished, dependent state. The dramatic imbalance in favor of Scott is striking – when viewed in the context of what was available for distribution when she created the Will of December 11, 2006 at age 88 – up to and including when she died at age 93 on April 15, 2011, five and one-half years later. And it is strikingly discordant and unbalanced when compared to the prior estate plans Edith carefully crafted at various points during her life in Florida when she was in good health, self supporting, living and thriving on her own, relying on the advice of her long time estate counsel, and dealing

with each of her children from a condition of self-sufficiency and equality. Moreover, it is not explainable by any other events in Edith's life, such as a falling out with Craig or Lynne, which never occurred.[6]

A primary argument raised by the defendant-executor Scott in rebuttal of the presumption of undue influence and in response to the foregoing compelling, cummulative circumstantial evidence of undue influence is the claim that Edith never treated her children equally in her estate plans and that he – Scott - always benefited thereunder as compared to his siblings. That argument is flawed factually and qualitatively, and fails to disperse by any standard the stark picture of a testatrix under the influence of a loved one upon whom she is acutely dependent, while in a state of marked physical decline and psychological vulnerability, radically changing her estate plans.

A detailed review of Edith's prior plans is necessary to put the disputed Will in context.

The Trust of April 19, 1996

Under the 1996 Trust, Edith divided her residuary estate equally between her three children, Craig, Scott and Lynne, after making two specific bequests: Craig was to receive the Florida condominium in which she resided, and Scott was given the right to acquire the Sea Isle City property for 80% of its date of death value, i.e., at a 20% discount. It is clear that this proposed distribution disfavored Lynne – she got one-third of the residuary and nothing else. It has not been shown that Scott was favored in the Trust, however, as it is not known what the value of the condominium was at that time, nor what the Sea Isle City property was then worth, nor, more pertinently, what Edith thought they were worth. But the court can not find on the evidence that the 20% discount afforded Scott exceeded in value the outright bequest of the condominium to Craig. There is no evidence that any imbalance between the brothers' inheritances was in any way significant, either way.

6 That Edith told the New Jersey attorney that Lynne 'never lifted a finger' as to the Sea Isle City property is factually accurate but, in my view, does not establish any falling out between mother and daughter.

Amended and Restated Trust of April 3, 2000

Four years later, on April 3, 2000, Edith modified her Trust (J-3). Again, Edith divided her residuary estate between her three children equally. There are specific bequests to the sons: $100,000 to Craig and $100,000 to Scott. Again, Lynne – who apparently is and was the most financially well-off of the three siblings – is comparatively disadvantaged somewhat; but Craig and Scott are treated equally. The option to buy Sea Isle at a discount is no longer afforded to Scott, and the specific bequest to Craig of the Florida condominium is eliminated. Thus, there is nothing in the Amended Trust of April 3, 2000 – as there was nothing in the original Trust four years earlier – expressive of an intention to favor Scott at the expense of Craig, markedly or otherwise.

2nd Amended Trust of December 18, 2000 and 3rd Amended Trust of December 29, 2000

Eight months later, in December 2000, Edith twice revisited and amended the Trust, once on December 18, 2000 (Second Amended and Restated Trust, J-4) and again on December 29, 2000. (Third Amended and Restated Trust, J-5). Edith revisited the initial Trust arrangement in which she had incentivized the acquisition of Sea Isle City by Scott with a discount. It is evident that Edith wanted that property kept in the family. Lynne had her own summer home at the Jersey Shore (on Long Beach Island) and thus had no need for it. Craig now lived in South Carolina, after decades in Florida, and stood to inherit the Florida condominium. Scott – who made frequent use of the Sea Isle City property and helped care for it and maintain it – was the obvious person to inherit it if, as Edith then wished, it was to be retained in the family. In the Second Amended Trust, Edith perpetuated the division of her residuary estate in equal thirds to her three children – as she had done in the initial Trust and the first Amended Trust. In addition Edith gave Craig and Scott (but not Lynne) specific bequests of $100,000 and gave Craig the Florida condo outright, all as she had done in the prior Amended Trust. Then, Edith restored the incentive to Scott to acquire the Sea Isle City property, now at a 30% discount.

Again, the Second Amended Trust disfavors Lynne, and favors the apparently less well-off sons. As between the two sons, the situation is more complicated. According to the February 7, 2000 memo of Edith's Florida estate attorney, Marvin C. Gutter, Esq., (J-30) Edith valued the Sea Isle City home at "$400,000 +", the Florida condominium at $50,000, her securities, including $300,000 of UPS stock, at $500,000, and her cash and CD's at $100,000, for a total then existing asset pool of approximately $1,050,000. The value to Scott of the 30% discount on the acquisition of the Sea Isle City property then, at the time of the December iterations, would have been about $120,000. If Scott exercised the option, he would be able to buy a $400,000 asset (the Sea Isle City property) for $280,000 – a bequest, if you will, of $120,000. In addition to that $120,000, Scott was to receive $100,000 as a specific bequest (J-4, at 2(A)). Scott would also receive his one-third share of the residuary estate. So, under this scenario, Scott does somewhat better than Craig, as Craig's $50,000 condo is worth $70,000 less than Scott's $120,000 discount; but the discrepancy is not significant in context.

Eleven days later, Edith again revisited her estate plan, signing on December 29, 2000 her Third Amended and Restated Trust. (J-5). Edith adds to Lynne's one-third residuary interest a $100,000 bequest. Craig's inheritance remains unchanged: one-third of the residuary estate, plus the Florida condo valued by Edith at $50,000, plus $100,000. Scott retains his one-third residuary interest, and retains his $100,000 bequest, like Craig, unless Scott exercises his right to buy the Sea Isle City property at the 30% discount, in which case Scott forfeits the $100,000 specific bequest. In essence the only change here is that Lynne now gets a $100,000 bequest (in addition to her one-third residuary interest), and Scott loses his $100,000 bequest, if he exercises the 30% discount purchase of Sea Isle City. Thus Scott gets $100,000 less, Lynne $100,000 more.

Further examining the Third Amended and Restated Trust of December 29, 2000, again in the light of the values Edith had attributed to her assets that year (J-30), if Scott did not exercise his option, he and Craig and Lynne each received a $100,000 specific bequest,

and each received one-third of the residuary estate (now augmented by the Sea Isle City property as well). Craig comes out slightly ahead, in view of the additional specific bequest to him of the condominium, valued by Edith at that time at $50,000. This is essentially an equal distribution between the children, with Craig slightly favored.

If Scott did exercise his option, he got a "gift" of $120,000 (30% of $400,000), plus a one-third residuary interest. Craig got $100,000, plus the Florida condo ($50,000), plus one-third of the residuary interest. Lynne got $100,000 plus one-third of the residuary estate. Under this analysis, Scott does slightly better than Craig – about $30,000 better. This too is a roughly equal distribution, slightly favoring Scott.

FOURTH AMENDED AND RESTATED TRUST

In her Fourth (and final) Amended and Restated Trust, signed three years later on December 8, 2003, Edith entirely removed Scott's option to acquire the Sea Isle City property at a discount, opting instead to simply leave each child a one-third interest in her residuary estate, after preserving the specific bequests to Craig of $100,000 and the Florida condominium. (J-6). Thus, Craig receives the favored portion, equal to $100,000 plus the unknown value of the condominium.

It appears, then, that Lynne always was designated to receive solely a one-third residuary interest (except in the Third Amended Trust of December 29, 2000, when she was also slated to receive a $100,000 bequest). It does not appear that Scott was favored over Craig in the original Trust of 1996; the brothers appear to have been treated equally in the Amended Trust; Scott was favored somewhat in the Second Amended Trust. The Third Amended Trust favors Scott somewhat, if he buys Sea Isle at a discount; if not, Craig is slightly favored. The differences are not significant. In the Fourth (and final) Amended Trust, Craig is favored over Scott in an amount equal to $100,000 plus the value of the Florida condominium.

It is against this backdrop that the challenged Will of December 11, 2006 must be measured. In that instrument, Scott receives a specific bequest of the Sea Isle City property

not at a 20% discount or 30% discount, but outright. (Article Third). According to the New Jersey attorney's associate, Louis C. Tomasella, based on information provided to him by Scott, that asset is worth at that time between $1.2 and $1.5 M (Tomasella memo of July 17, 2006). It is unclear from the trial record whether Edith herself was even aware of the value of this property at the time of the creation of the 2006 Will. Under the Will, Craig is no longer to receive the Florida condo. That asset was badly damaged by Hurricane Wilma in October of 2005, and was sold in June of 2006 for $105,000. Craig is the named beneficiary of a one-hundred thousand dollar bequest (Article Fourth). What is left of the estate – the residuary estate – is then divided between Craig and Lynne, 50/50.[7]

What would have been in the residuary estate had Edith passed away after signing the December 11, 2006 Will? According to the Tomasella memorandum there were non-Sea Isle City assets valued at between $500,000 – $700,000. If one sets aside the fact that all taxes, expenses, attorneys fees, commissions, etc. will deplete the residuary estate, but not Scott's specific bequest of Sea Isle City, then the planned distribution – if this instrument is to be credited – is as follows:

1. Scott - $1.2 to $1.5 M – free and clear
2. Craig - $100,000 + one-half of $400,000 ($200,000) to $600,000 ($300,000) i.e., between $300,000 and $400,000 total.
3. Lynne – between $200,000 and $300,000

This unprecedented discordancy of intention and benefit can not be explained away by claims that Edith always favored Scott in her testamentary plans. In point of fact, as seen in the preceding analysis, that was frequently and for years not the case. And, dispositively, there was never an estate plan authored by Edith remotely so drastic and disparate in the imbalance among the children, particularly as between Scott and Craig.

7 It was conceded at trial that Edith intended that all assets pass by Will. There is no evidence that she wanted some of the assets to pass by the Will and some to pass by the Trust. Accordingly, I have done no analysis of the proportionality

Scott also argues that his mother always wanted him to have the house, and that her gift to him of the house is simply consistent with her long term estate plans dating back to 1996. I find that Edith wanted to keep the house in the family, if possible, and that Scott was the natural child to receive it: Lynne had a summer home on Long Beach Island; Scott lived down south and was, until Hurricane Wilma in 2005, in line to inherit the Florida condominium. Scott and his family used Sea Isle much more than the other siblings and also put time and energy into maintaining it. But it is not true that Scott was always in line to inherit it. He was not to inherit it, and had no option to acquire it, from April 3, 2000 (Amended Trust) until December 18, 2000 (Second Amended Trust). And he had no such right or option from December 8, 2003 (Fourth Amended Trust) until the disputed Will of December 11, 2006, which granted the property to him outright.

It bears repeating that there is no challenge by any party to any of the testamentary plans drawn up by Edith while she lived in Florida.

It is true that Scott had the option to buy Sea Isle at a 20% discount under the initial Trust of April 19, 1996, but he lost that right under the Amended Trust of April 3, 2000. He regained that right, now at 30%, as a result of the Second (December 18, 2000) and Third (December 29, 2000) Amended Trusts, only to lose it again under the Fourth (and final) Amended Trust of December 8, 2003. It is plain, then that Edith drew some estate plans that incentivized Scott to acquire Sea Isle City, at a discount of 20% or 30% below fair market value, and created other estate plans that simply put Sea Isle City into her trust/estate, with Scott having no special rights thereto.

What Edith never did is to give Sea Isle City to Scott – outright – nor ever created anything close to the severe imbalance reflected in the December 11, 2006 Will.

It is said that Edith had plenty of time after the execution of the December 11, 2006 instrument to change her testamentary plan had she wanted to. Time she had. However, to actually accomplish that, owing to her mental and physical deterioration, and her dependence

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of the dispositions had only some but not all trust assets passed by Will.

on Scott, would have required heroic efforts. She would have required Scott's assistance to make the change. That measure of independence of thought and condition existed throughout all the prior iterations of the estate plan crafted by Edith over the years, in Florida. By the time the December 11, 2006 instrument was executed, however, that independence was gone, or greatly diminished, never to be regained. Moreover, I find that she in fact told Craig to tell Scott to take her back to the New Jersey attorney to rectify the "mistake" the December 11, 2006 Will would create. Craig conveyed the mother's wishes, to Scott, in the mother's presence. It was never done. Under all the circumstances, it has not been shown that that instrument, or Edith's failure to correct it, was free of undue influence. It was Scott's burden to prove otherwise.

It is true that Edith was not utterly and completely dependent on Scott at the time she made the Will. Her daughter Lynne was nearby, and saw her often. Lynne took Edith to doctor appointments, beauty parlor appointments and shopping. In addition, Edith visited with Craig and Craig with her, and they frequently spoke unimpeded on the telephone. Edith was not an isolated captive in Scott's home, a motif in some undue influence cases. But that access does not dispel the very real transformation Edith suffered from independence and health in Florida to ill health, depression and acute dependence upon residing with Scott in New Jersey, a circumstance that persisted unabated until she died.

It is said that Craig and Lynne knew that Edith left the shore house to Scott in the Will prepared by Cevasco, yet did nothing to change it. I find that Edith brought a copy of the Will she had executed with her at Christmastime in 2006, when she visited Craig at Craig's home down south. The exhibit is a true version of what he was shown (P-12). It is dated December 11, 2006 – the date of the actual execution. It bears the "(s)EW" on the testatrix's signature line, meaning it is a copy of what Edith signed (J-1), and it repeats it on page 10. Also on page 10 is the "(S) AJC" meaning it is a copy of what the attorney signed as notary. It is not stamped "Draft" because it is not a draft. (Compare the draft will and draft power of attorney sent by Cevasco's office on September 15, 2006 and October 23, 2006, Exhibits J-

12 and J-14). It is a dead ringer of the executed, original December 11, 2006 Will (J-1).

I listened carefully to Craig's trial testimony, and I have read the cited deposition transcript extracts and am satisfied that he reviewed the one and only version of Edith's Will he ever saw at Christmastime, 2006, after it was signed, and not Thanksgiving, 2006, before it was signed, as she visited him at his home – all agree – both holidays that year, and what he reviewed is a copy of what she had signed.

I find further that Craig testified truthfully that his mother had not realized – and immediately regretted – the extent of the disproportion that her Will contained, and she wanted to change it. She realized that she was giving Scott the house under the Will, but did not at all realize how very little – in proportion – she had now left to Craig and to Lynne. If Sea Isle City was worth a million or so at that time – as she apparently understood it was worth at the time of her discussion with Craig – then she didn't have nearly enough resources to leave to Craig and or Lynne to be remotely comparable, or even to be 'unequal' to the measured extents she had carefully calibrated in the initial trust instrument and in each of the four modifications she made to that instrument over the years 1996-2003. As aforesaid, upon realizing what she had done – or what had been done – she told Craig to call Scott while, in her presence, he did. Edith told Craig to tell Scott that she made a mistake and wanted him to take her back to the attorney to fix it. Craig conveyed that message to Scott, in Edith's presence. While Scott does not concede the conversation took place, he did not deny it in his deposition, and did not refute it when Craig sent him an email – before the litigation – specifically reminding him of the conversation.

I further credit Lynne's testimony that Craig advised her of the conversation shortly after it happened.

I also credit Craig's testimony that he followed up once with his mother, who at that time stated she was unsure of the status of the Will, and that he believed and trusted that his brother had followed up and implemented the mother's wishes by taking her back to the lawyer to fix the mother's estate plans.

In fact, however, no further visits to the attorney occurred before Edith died, and no amendments to her estate plans were implemented after execution of the December 11, 2006 Will. Edith continued to reside with Scott, never regaining a semblance of independence, continuing to coexist with Scott in a position of dependency and ill health, until she died. The failure to correct the instrument which favored Scott in unprecedented disproportion is, I find, a result of Scott's undue influence upon his aged, failing and dependent mother.

Accordingly, I find that the Will of December 11, 2006 is not the free and voluntary act of Edith Weiner but rather is the product of undue influence by her son, the primary beneficiary thereunder. I therefore set it aside. In the context of defendant's burden, I find that Scott has failed to prove by a preponderance of the evidence that the December 11, 2006 Will was not the product of undue influence.

(B) <u>EFFECTIVENESS OF A VALID WILL TO OVERRIDE THE TRUST</u>

For purposes of completeness, I will address the issue of the efficacy of the Will, (had it not been set aside because of undue influence), to dispose of assets titled in the name of the Revocable Trust Edith had established. It held title to the house, pursuant to a deed to the trust executed by Edith on April 19, 1996 (simultaneously with her execution of the initial Trust), recorded on October 2, 1996. (J-7). Her tax bills were issued to her in the name of the Trust – which held the title. Her primary checking account was expressly an account of the Edith Weiner Revocable Trust. Her security account was also in the name of the Trust. Craig and Scott and Edith all knew that the Trust existed, and knew about it for years. They also knew that the shore house and the other assets were so titled. They understood that the Trust was an estate planning device. Edith always treated all her property as her own – regardless of whether it or they were titled in the name of the Trust. Edith thought she was disposing of all of her assets – including assets titled in the name of the trust – when she signed the December 11, 2006 Will. She didn't think that some assets would pass via the Will, while others would pass by, or be controlled at her death by, the Trust. She did not even discuss the existence of the Trust with the New Jersey attorney. Clearly, at the time she

signed the Will she thought all she had – however titled – would be distributed at her death pursuant to it. The question becomes this: if that Will was valid and not the product of undue influence, was it effective to control disposition of the Sea Isle City property and/or the other assets titled in the name of the Trust? In my view the answer to that theorical inquiry is "Yes".

If the Will was valid, Edith plainly wanted Scott to inherit her house. If the Will had been upheld as being faithful to the free and uninfluenced intention of Edith, it expressed her desire that Scott inherit the house as a specific bequest. Her Will does not mention the Trust – it does not purport to give by Will what it acknowledges to be titled in the name of the trust. It is simply silent as to the existence of any trust.

The Fourth Amended and Restated Edith Weiner Trust Agreement was created while Edith was a Florida resident. That document, by its terms, is governed by Florida law. Article III (1). Pursuant to Article 1(A) of that Trust, Edith reserved the right "…(c) by separate written instrument delivered to the Trustee, to revoke this Agreement, in whole or in part and otherwise modify or amend this Agreement." Indeed, as has been shown, Edith modified the original Trust of 1996 some four (4) times in her lifetime. Edith amended the Trust by separate written instrument (her Will) which was delivered to the Trustee (i.e., herself). Accordingly, the Will effectively modified the Trust with respect to the disposition of Sea Isle City.

Under Section 736.0602(3) of Florida's version of the Uniform Trust Code,

…the settlor may revoke or amend a revocable trust:

(a) By substantial compliance with a method provided in the
Terms of the trust; or
(b) If the terms of the trust do not provide a method, by:

1. A later will or codicil that expressly refers to the trust or

specifically devises property that would otherwise have passed according to the terms of the trust; or

2. Any other method manifesting clear and convincing evidence of the settlor's intent.

Here, the settlor of this revocable trust amended her trust "by substantial compliance with a method provided by the terms of the trust…". As aforesaid, she delivered the "separate written instrument" – the Will – to the Trustee – herself. Because the Will can be deemed under the above analysis to effectively amend the Trust in the manner expressly provided by the Trust, the Will's failure to identify the Trust – or acknowledge that the Sea Isle City property is held by the trust – poses no hurdle to implementing a testatrix's intent, under Florida law.

To summarize, had the Will been found to be a valid instrument, untainted by undue influence, it would have been found to effectively amend the trust as to the Sea Isle City property, because it effectively amended the Trust by a method provided in the Trust, in accordance with Florida Law.

It is contended in the alternative that New Jersey law controls, not Florida law. The Fourth Amended and Restated Trust Agreement provides at Article IV (A), para. 23 that "the situs of a Trust may be transferred to such other place as the Trustee may deem in the best interests of the Trust". I do not read that language as abrogating the express language of the Trust making Florida law controlling. If New Jersey law applies, however, the same result obtains: Edith amended her Trust in the manner provided by the terms of her Trust – by delivering a written instrument (Will) to the Trustee (herself). That amendment was therefore effective.

A Will has been held not to be a proper instrument to revoke or modify a revocable trust when the power to do so is an inter vivos power because a Will has no legal efficacy

until the death of the testatrix. See Estate of Kovalyshyn, 136 N.J. Super. 40, 47 (Hudson County Court 1975); Estate of Henning, 116 N.J. Super. 491 (Ch. Div. 1971). However, if we posit that Edith clearly intended to dispose of Trust assets by Will – that she clearly intended by her Will that Scott inherit the Sea Isle City property – then, under the doctrine of probable intent, the court would give effect to that specific bequest, notwithstanding that the property was titled in the name of the Trust.

Under N.J.S.A. 3B:3-33.1, which codifies the doctrine of probable intent.

> a. The intention of a testator as expressed in his will controls the legal effect of his dispositions, and the rules of construction expressed in N.J.S. 3B:3-34 through N.J.S. 3B:3-48 shall apply unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary.
>
> b. **The intention of a settlor as expressed in a trust, or of an individual as expressed in a governing instrument, controls the legal effect of the dispositions therein and the rules of construction expressed in N.J.S. 3B:34 through N.J.S. 3B:3-48 shall apply unless the probably intent of such settlor or of such individual, as indicated by the trust or by such governing instrument and relevant circumstances, is contrary.** For purposes of this Title, when construing each of these rules of construction the word "testator" shall include but not be limited to a settlor or a creator of any other governing instrument; the word "will" shall include a trust or other governing instrument; the word "devise" shall include any disposition in a trust or other governing instrument; and the word "devisee" shall include a beneficiary of a trust or other governing instrument.

(Emphasis added).

If one posits a December 11, 2006 Will untainted by undue influence, then that Will effectively left the Sea Isle City property to Scott, notwithstanding that it was titled in the Trust, because Edith clearly and expressly so intended, and the "technicality" of title in a revocable living trust would not defeat that intention.

Accordingly, the court determines that the December 11, 2006 Will, being the product of undue influence, is invalid. Had the Will been valid, it would have effectively devised and bequeathed the Sea Isle City property to Scott under both Florida and New Jersey law.

(C) JEWELRY

Any and all claims regarding Edith's jewelry have apparently been abandoned.

(D) GIFTS

There were various inter vivos transfers to Craig or his wife Pamela during the period of March 14, 2006 through April 28, 2006. Those checks were all filled out by Scott for Edith, but signed by Edith.

The court determines that those checks denominated as loans are loans and have not been proven to have been gifts. The contrary uncorroborated testimony of Craig and his wife is not credited by the court, including the testimony of Craig and Pamela as to the alleged forgiveness of the $70,000 loan Edith gave to cover the down payment on Myrtle Beach pending sale of their Florida home. Accordingly, I find as follows as to the challenged transfers to Craig:

Amount	**Name**	**Date**	**Check #**	**Ruling**
$ 70,000.00	Pam	3/14/2005	96	Loan
$ 10,000.00	Craig	9/23/2006	1624	Loan
$ 10,000.00	Pam	12/15/2008	1673	Loan
$ 10,000.00	Craig	12/15/2008	1672	Loan
$ 10,000.00	Pam	8/1/2009	1579	**Gift**

$ 10,000.00	Craig	5/15/2009	1577	Loan

Likewise, I find the following transfers have not been shown by plaintiffs to the gifts, and are, rather, debts owed the Estate, or advances on Craig's inheritance.

Amount	**Name**	**Date**	**Check #**	**Ruling**
$ 10,000.00	Craig	11/17/2010	n/a	Loan
$ 15,000.00	Craig	2/15/2011	n/a	Loan
$ 3,400.00	Craig	4/19/2011	n/a	Loan
$ 20,000.00	Craig	4/28/2011	n/a	Loan

$168,400.00 of which all but $10,000 is a loan to Craig.

CONCLUSION

Accordingly, judgment is rendered in favor of plaintiffs setting aside the Will of December 11, 2006, upon the findings and conclusions set forth herein. Plaintiffs' counsel shall submit a Judgment under the Five Day Rule.