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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
PROBATE PART
DOCKET NO.: P-004-11

IN THE MATTER OF THE ESTATE OF

JOHN C. DOBISH,

Deceased.

CIVIL ACTION

OPINION

DECIDED: February 16, 2012

APPEARANCES: Archer & Greiner, P.C. (Leo J. Hurley, Jr., Esq., appearing), attorneys for plaintiff
Walsh & Walsh, Esqs. (John K. Walsh, Jr., Esq., appearing), attorneys for defendant

HARRY G. CARROLL, J.S.C.

BACKGROUND

Decedent, John C. Dobish died on December 11, 2009. On December 22, 2009, decedent's son, Darin Dobish ("Darin"), filed a caveat against admitting to probate any paper writing purporting to be the decedent's Will. On January 3, 2011, plaintiff Dorice Dobish ("Dorice"), daughter of the decedent, filed a Verified Complaint seeking to set aside that caveat and admit to probate a Will purportedly executed by the decedent on May 14, 2009.

Darin (denominated hereafter as "defendant" for purpose of these proceedings) subsequently filed an Answer and Counterclaim on January 24, 2011. The Answer sets forth various affirmative defenses, including diminished mental capacity, breach of fiduciary relationship, undue influence, and suspicious circumstances surrounding the preparation and execution of the Will and Trust Instrument. Darin repeats those assertions in his Counterclaim which seeks to void the 2009 Instruments based upon non-compliance with statutory formalities, lack of capacity, and undue

influence. However prior to trial he withdrew his claim that decedent lacked testamentary capacity. Darin further seeks to set aside an intervivos transfer made pursuant to the 2009 Revocable Trust, i.e., a certain deed dated August 14, 2009, an accounting, and restraints against the dissipation of assets.

Trial in this matter commenced on January 17, 2012 and continued on January 18 and 25, 2012. Plaintiff on her main case called as witnesses Roger Levine, Esq. (the scrivener of decedent's 1998 and 2009 estate planning documents), Cecily Levine (Mr. Levine's wife who worked as a paralegal in his law office) and Andrew J. Cevasco, Esq. (the draftsman of the August 14, 2009 Deed and the Forgiveness of Loan document) to establish the validity of the documents at issue herein. Darin then testified as did his son Justin Dobish and his wife Andrea Dobish. On rebuttal Dorice testified, as did her boyfriend Scott Steidl and Patricia Reuter, a long-standing friend of the decedent and his late wife. Numerous exhibits were marked into evidence. Written summations were submitted by defendant on February 8, 2012 and by plaintiff on February 10, 2012. This decision follows.

LEGAL ANALYSIS

As earlier noted, following the death of John C. Dobish on December 11, 2009, his youngest son, Darin, filed a Caveat with the Bergen County Surrogate on December 22, 2009, "against admitting to probate any paper writing purporting to be the Will of John Dobish, Sr., and against the grant of letters of administration…to any person." Accordingly, Dorice instituted the present action to dismiss the Caveat, to admit to probate decedent's Will dated May 14, 2009, and to be appointed Executrix thereunder. Darin then filed a contesting Answer and Counterclaim in which he sought to dismiss plaintiff's Complaint, deny probate of the 2009 Will, invalidate the 2009 Revocable Trust, sustain the Caveat, declare that decedent died intestate, and appoint himself Administrator of the estate.

The documents introduced into evidence and thus at issue in this case are for purposes of further discussion grouped according to the year in which they were executed (i.e., "the 1998 documents" and "the 2009 documents"), and are briefly summarized as follows:

(a) The 1998 documents:

(i) Last Will dated April 13, 1998 – left all property to Living Trust; appointed Dorice and Darin as Co-Personal Representatives;

(ii) General Durable Power of Attorney – appointed Dorice and Darin as Attorneys-in-Fact;

(iii) Durable Power of Attorney for Health Care – designated Dorice and Darin as health care agents;

(iv) Living Will – designated Dorice and then Darin as health care representatives;

(v) Affidavit of Trust; and,

(vi) Living Trust dated April 13, 1998 – designated decedent as Trustee and Dorice and Darin as disability and death trustees; gave use and occupancy of the Garfield residence to Dorice for five years, with Dorice to have the right to purchase it at fair market value; balance in equal trust shares for all three children.

(b) The 2009 Documents

(i) Last Will dated May 14, 2009 – specifically excluded son John Dobish, Jr.; designated Dorice and then Darin as Personal Representative; left all property to Living Trust;

(ii) Durable Power of Attorney – designated Dorice and then Darin as Attorney-in-Fact;

(iii) Living Will – designated Dorice and then Darin as Attorney-in-Fact;

(iv) Certificate of Trust;

(v) Living Trust dated May 14, 2009 – designated decedent and Dorice as Trustees, Dorice as sole Successor Trustee, and Darin as alternate Successor Trustee; specifically excluded son John Jr.; specifically devised the Garfield residence to Dorice; forgave all loans to Darin; and divided all remaining assets between Dorice and Darin equally;

(vi) Deed dated August 14, 2009 transferring the Garfield residence from decedent and Dorice as Co-Trustees, to Dorice, with decedent retaining a life estate.; and,

(vii) "Forgiveness of Loan" document – wherein decedent released Darin from debts totaling $55,000.00.

I. COMPLIANCE WITH FORMALITIES

As an initial matter, defendant generally challenges the May 14, 2009 Will on the basis that plaintiff failed to establish that it satisfies the statutory requirements as to form and execution.

N.J.S.A. 3B: 3-2 (a) provides, in relevant part, that a Will be in writing, signed by the testator, and by at least two individuals, each of whom signed within a reasonable time after each witnessed the testator's signature.

Here the decedent's May 14, 2009 Will contains his signature as well as those of Lori Herman and Cecily Levine, the two witnesses, and a self-proving Affidavit. The Court accepts the testimony of Roger Levine, Esq., the scrivener of that Will and the Living Trust bearing even date, and Cecily Levine, regarding their identification of the signatures of the Testator and the witnesses on those documents, and the method and manner in which the documents were executed, all of which comport with the requisite statutory formalities. The Court further notes, and accepts, the testimony of these same witnesses that prior to execution of the documents by Mr. Dobish that they were reviewed with him both telephonically by Cecily Levine and later personally by Mr. and/or Mrs. Levine.

Accordingly, the Court finds that the 2009 estate planning documents satisfy the statutory requirements as to both form and execution.

II. LACK OF CAPACITY

Originally one of the grounds upon which Darin challenged the 2009 Will and Trust documents related to the decedent's alleged lack of capacity to make them. However, in the pre-trial memorandum submitted on his behalf, the court was advised that Darin withdrew his claim that decedent lacked testamentary capacity. Defendant's Pre-Trial Memorandum, p.6.

It is generally presumed that a testator or testatrix "was of sound mind and competent" when he/she executed the Will. Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981), citing Gellert v. Livingston, 5 N.J. 65, 71. A very low degree of capacity is sufficient. In re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999); In re Liebl, 260 N.J. Super. 519 (App. Div. 1992). Accordingly the burden is generally on the contestant to prove, by clear and convincing evidence, that the testator or testatrix, at the time the Will was executed, lacked the requisite mental capacity to make a Will. See, e.g., In re Frisch, 250 N.J. Super. 438 (Law Div. 1991); In re Weeks' Estate, 29 N.J. Super. 533, 544 (App. Div. 1954); In re Politowicz, 124 N.J. Super. 9 (App. Div. 1973). Medical testimony is ordinarily required to assist in establishing a lack of testamentary capacity.

The Court finds credible both the scrivener of the 2009 estate planning documents, Roger Levine, Esq., and Andrew Cevasco, Esq., who prepared the 2009 Deed and the "Forgiveness of

Loan" document. Both are experienced attorneys with a practice concentrated in the areas of wills, trusts and estates. The court also finds credible the testimony of Cecily Levine, who assisted in the review of the 2009 estate planning documents with Mr. Dobish and also witnessed the execution of those documents. Those witnesses all testified consistently that Mr. Dobish was able to freely and clearly convey his wishes. Moreover, he reported to Mr. Cevasco that he was in fine health except for some problems with his knee. Indeed, that testimony comports with that of Darin and his witnesses, who although describing some physical ailments experienced by Mr. Dobish especially resulting in two incidents where he fell, and a lack of mobility, Darin did not claim, and produced no evidence to support any finding, that his father lacked the requisite mental ability to formulate, convey or execute the estate-planning determinations embodied in the 2009 documents. Additionally the court also notes the testimony of Patricia Reuter, who first met Mr. Dobish and his late wife in 1979 and remained friends with him until the time of his death. Mrs. Reuter, who appeared to the court to be genuinely sincere and to have no stake in these proceedings, unequivocally described Mr. Dobish's mental state as "very good" and that she never had any reason to question his mental ability.

Accordingly, to the extent that Darin may not be deemed to have abandoned his contention that decedent lacked the capacity to execute either the 2009 documents or any earlier estate planning documents, the Court finds in any event that such allegation has not been established and is contrary to the clear weight of the evidence.

III. UNDUE INFLUENCE

Even where it is presumed that a Testator is of sound mind to execute a Will, that presumption can be overcome, however, upon a showing of undue influence. Haynes v. First Nat'l State Bank, supra, 87 N.J. 163, 176; Gellert v. Livingston, 5 N.J. 65, 76. Undue influence has been defined as "mental, moral or physical exertion which has destroyed the free agency of a Testator by preventing the Testator from following the dictates of his own mind and will and accepting instead the domination and influence of another." Haynes v. First Nat'l Bank of N.J., supra, 87 N.J. 163, 176; In re Estate of Neuman, 133 N.J. Eq. 532, 534 (E. & A. 1943); In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008).

However, "[n]ot all influence is 'undue' influence." Gellert, supra, 5 N.J. at 73. "It denotes conduct that causes the testator to accept the 'domination and influence of another' rather than

follow his or her own wishes." In re Estate of Stockdale, supra, 196 N.J. at 303 (citing Haynes, supra, 87 N.J. at 176).

"Ordinarily, the burden of proving undue influence falls on the will contestant." Id. at 303. However, "if the will benefits one who stood in a confidential relationship to the testator" and that "confidential relationship" is "coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption." Ibid. A confidential relationship exists if the testator, "'by reason of… weakness or dependence,' reposes trust in the particular beneficiary, or if the parties occupied a 'relation[ship] in which reliance [was] naturally inspired or in fact exist[ed].'" Ibid. (quoting In re Hopper, 9 N.J. 280, 282 (1952)). "The factors to be considered in determining whether a confidential relationship is present…include whether trust and confidence between the parties actually exist[ed], whether they [were] dealing on terms of equality,…whether one side [has] exerted 'over-mastering influence' over the other or whether one side [was] weak and dependent." Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 402 (App. Div. 2007). "Its essentials are both 'a reposed confidence and the dominant and controlling position of the beneficiary of the transaction.'" Ibid. (quoting Stroming v. Stroming, 12 N.J. Super. 217, 224 (App. Div.), certif. denied, 8 N.J. 319 (1951)).

The contestant has the burden of proving, by a preponderance of the evidence, that a confidential relationship exists. Ibid. The "preponderance of the evidence" standard requires the contestant to establish that the existence of a confidential relationship is "more probable than not." Id. at 403. However, existence of a confidential relationship between the testator and the beneficiary does not alone create a "presumption of undue influence." Gellert, supra, 5 N.J. at 71. There must also be "suspicious circumstances," which need only be "slight." Ibid.; Haynes, supra, 87 N.J. at 176; In re Will of Liebl, 260 N.J. Super. 519, 528 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993).

Essentially, Darin's theory of the case was that Dorice maintained a confidential relationship with their father by virtue of which she exercised undue influence over his estate planning determinations. Darin contends that after Dorice moved back into her father's home in or around 1989 that she "ensconced" herself in the home and treated it as her own. In substance Darin alleges that his father lacked mobility, depended upon Dorice for everything from medical and doctor appointments to food, and eventually succumbed to pressure from Dorice to alter his estate plan in 2009, most notably by devising her the Garfield residence. Having had the opportunity to evaluate

the testimony and credibility of the witnesses, the court finds that the evidence, taken in its totality, does not support such a finding.

Initially, the Court finds it undisputed that it was decedent, not Dorice, who first selected Mr. Levine for his estate planning matters in 1998, after having attended a seminar given by Mr. Levine. Subsequently, although Dorice accompanied her father to Mr. Levine's office in 2009, Mr. Levine took his direction from Mr. Dobish, not Dorice. Specifically Mr. Levine testified, credibly, that it was Mr. Dobish who explained the changes he wished to make, and that if Dorice was speaking he would not have allowed her in the room. The Court finds this testimony consistent with that of Mr. Cevasco, who likewise indicated that while Dorice accompanied her father to his office, she was not permitted in the room during their discussions. Again, Mr. Cevasco took his direction solely from Mr. Dobish, who gave no indication that he was not acting freely.

The Court accepts that Mr. Dobish suffered from some physical ailments which limited his mobility and that he at times required assistance in such functions as moving around the home, climbing stairs, shopping, attending doctor's visits, etc. While certainly Dorice was present in the home and tended to a substantial portion of her father's needs, she did not do so to the exclusion of Darin or his family members. Rather, Darin testified that he also transported his father to the doctor's office on several occasions, as did his son Justin on at least one occasion.

Also, importantly, the Court finds from the testimony of Darin himself and his other family members that Dorice did not either deny or attempt to deny them access to Mr. Dobish. Rather, Darin testified that he would generally visit with his father once or twice a month, and celebrate other occasions such as birthdays, Father's Day etc., with him. Darin's wife, Andrea, testified that no advance permission was needed from Dorice to visit Mr. Dobish and she specifically testified to one such occasion in March 2009 when she visited him unannounced. Additionally, when Dorice would take vacations (which the Court notes were short, consisting of 2-3 days), she would request that Darin's son Justin look in on Mr. Dobish to ensure that he was properly attended to, and that Justin did so on some 3-4 occasions during 2009.

In its ultimate analysis this Court arrives at the same result, regardless of whether it is the contestant, Darin, who bears the ultimate burden of proof or whether that burden is deemed to have shifted to Dorice, the proponent of the Will and Trust documents, by virtue of the existence of a confidential relationship and the presence of suspicious circumstances.

The Court finds that Darin has failed to satisfy his burden of establishing a "confidential

relationship" in the legal sense between Dorice and his father. It is true that the evidence does support a finding that Dorice lived with her father in the Garfield residence since 1989, during which time she looked after him, and occasionally drove him to doctors' appointments and visits to Mr. Levine's office, Mr. Cevasco's office and an attorney in Paramus who referred him to Mr. Cevasco. However, what the evidence fails to demonstrate is that Dorice exerted "over-mastering influence" over her father or that her father was "weak and dependent," Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 402 (App. Div. 2007), key elements in establishing the existence of a confidential relationship. Unlike Darin, who visited with his father perhaps once or twice a month, Dorice lived with her father and was hence in a better position to testify about his daily activities. The Court thus accepts Dorice's testimony that up until the time he suffered a stroke in August 2009 Mr. Dobish regularly drove himself to the Garfield senior citizens' center and to do food shopping, as well as working in his garden. The Court further accepts Dorice's testimony that while her father required the assistance of a cane and at times a walker to get around, by and large he was able to get around by himself. This testimony was bolstered by that of Mrs. Reuter, who observed that at a barbecue she attended at the Dobish home in 2009 Mr. Dobish walked down the stairs without assistance. Additionally Mrs. Reuter, who the Court deems to be a highly credible and independent witness with no stake in these proceedings, characterized Mr. Dobish as an independent and "strong-willed" individual. The Court also accepts the testimony of Dorice and Mr. Steidl, which is corroborated by decedent's handwriting in his check register, that until he suffered his stroke Mr. Dobish handled his own financial affairs and was highly protective of his personal papers and would sit at the kitchen table and write out checks in payment of his bills and expenses, including doctors, taxes, automobile insurance, etc, free of any input or interference from Dorice.

The Court similarly finds nothing that would rise to the level of suspicious circumstances surrounding Mr. Dobish's ultimate disposition of the Garfield residence as embodied in the 2009 documents. Rather, this appears to constitute simply another phase in Mr. Dobish's long-standing care and concern for Dorice. It is undisputed that Mr. Dobish allowed Dorice and her child to live in the home for many years, during which time she may or may not have made financial contributions for rent while Mr. Dobish paid the utilities, taxes and insurance on the home.[1] During this time he

[1] While in their testimony both Dorice and Mr. Steidl appeared less than forthcoming with respect to the amount and frequency of any rent payments they made in cash, as to which no records were or could be produced, in the ultimate analysis this does not affect the Court's conclusion with respect to the magnanimous treatment accorded Dorice by Mr. Dobish during his lifetime.

further assisted Dorice financially via contributions for her automobile purchases and legal fees for her divorce. Mr. Dobish's original estate plan in 1998 clearly evinced an intent to treat Dorice differently with respect to the residence by granting her the right to occupy it for a five year period, together with the right to purchase it. Indeed, Mr. Dobish's intended disposition of the home appears to have been a particular source of concern to Darin who admitted in his testimony that he specifically questioned his father about it, who responded that Dorice was fearful that he and his brother would throw her out of the home. Even despite Darin raising this concern with his father while he was alive, Mr. Dobish appears to have not thereafter deviated from his course of care and concern which he had earlier demonstrated toward Dorice. By Darin's own admission in his deposition testimony, read into evidence, Mr. Dobish acted out of "compassion", and "always made decisions with his heart, so if somebody needed help he would help them". P-44 at pages 30-32. Examples of this appeared throughout the trial, and included not only Mr. Dobish's favorable treatment of Dorice, but also his willingness to assist Darin by contributing toward the down-payment on his home, loaning him money for a car, co-signing a college loan for Darin's son, and taking Andrea into his home during the brief period when they separated.

The Court finds ample evidence from which to conclude that while decedent ultimately determined to treat Dorice and Darin equally with respect to the remainder of his assets (while totally excluding a third child, John Jr.), that a clear basis existed for decedent to treat them differently with regard to the Garfield residence. Certainly Dorice resided there for at least the last twenty years. While living there, by Darin's own admission, Dorice assisted her father by cooking for him, taking care of him, providing him meals, cleaning up after him and providing him assistance in getting around. However Mr. Dobish had also assisted Darin as well, and it was clearly uncontroverted that Mr. Dobish provided financial assistance to Darin in purchasing his residence, regardless of whether that financial assistance took the form of a gift or a loan. Further, Darin admittedly took a $15,000 loan from his father in April or May 2009 in order to purchase a car, which loan had gone unpaid. Additionally, around the summer of 2008 Darin concededly had credit issues and hence requested that Mr. Dobish co-sign a college loan for one of Darin's sons, to which he acceded.

It is precisely the above factors that lend credence to Mr. Levine's testimony that when he discussed Mr. Dobish's planned changes with him in 2009 he specifically stated that he had loaned his son some money that would be forgiven and therefore it would be fair to leave the residence to

Dorice, and that the estate planning documents Mr. Levine thus prepared provided for the forgiveness of any such debts. Similarly, when Mr. Dobish consulted with Mr. Cevasco and retained his services, based upon Mr. Dobish's instruction Mr. Cevasco then proceeded to contemporaneously prepare both the Deed conveying the Garfield residence to Dorice and the document entitled "Forgiveness of Loans" made to Darin. Further compelling evidence of Mr. Dobish's intent to so configure his estate plan in this fashion is found in his own notes dated April 12, 2009 (P-31), wherein he made reference to seeing a lawyer, giving the house to Dorice, forgiving all loans to Darin and Justin, and in which he concluded "…all these loans are forgiven for Dorice getting house. It might not seem fair but this is how it is."

While often cases of this nature hinge upon credibility findings, the Court, even accepting Darin's testimony at face value, concludes that the evidence which he adduced at trial was woefully insufficient to establish a claim of undue influence. This Court's impression of Darin is that he was motivated by a desire to receive an equal share of the Garfield residence. He appeared concerned by this possibility and during trial admitted that at least on one occasion he directly questioned his father about the earlier trust provision which allowed Dorice to remain in the house. Additionally, within 4-5 hours of his father suffering a stroke in late August 2009, while at the hospital Darin was already asking Dorice for copies of their father's estate planning documents, notwithstanding the fact that Mr. Dobish did not pass away until more than three months later. Also, the Court specifically notes that Darin appeared somewhat evasive and less than candid when questioned about communications between himself and his father's former companion, Mary Largey, wherein Darin ultimately testified that he "could not recall" telling Ms. Largey that his intention was to use litigation to deplete the assets of the estate.

In summary then, the Court finds that Darin has failed to establish the presence of either a confidential relationship or suspicious circumstances sufficient to shift the burden of proof. Nonetheless even if the Court is mistaken and that these factors were in combination found to exist, the Court finds that plaintiff has rebutted any presumption of undue influence. Rather the Court finds a well documented and reasonable and substantial basis upon which to conclude that Mr. Dobish intended to exclude completely his son John Jr., to make separate provisions for Dorice and Darin with respect to the disposition of the home and the forgiveness of debts, and to otherwise essentially treat them equally.

IV. ACCOUNTING

In the Fifth Count of his Counterclaim Darin sought an accounting of Dorice's actions as attorney-in-fact under Mr. Dobish's Power of Attorney, and to compel her to return to the decedent's estate those assets from which she improperly benefited.

During the one year period prior to trial during which this matter was pending the parties had the ability to engage in pre-trial discovery, including document demands, interrogatories and depositions. As a result, check registers and bank statements for the John C. Dobish Living Trust were produced and introduced into evidence at trial (D-8, 9, and 10), along with other bank records (P-36, 37, 38, 39), a Consolidation Summary from Morgan Stanley (P-35), and decedent's 2009 income tax return (P-40). Also at issue and introduced into evidence was documentation related to improvements made to the Garfield residence (primarily the kitchen) by Dorice following her father's stroke, and a real estate tax payment made by Dorice to the City of Garfield on the date of her father's death (D-12). The Court concludes that as a result of the discovery and trial process that Darin had a full and fair opportunity to investigate, question and raise any objections concerning both the nature and extent of decedent's assets and any improper expenditures by Dorice. Hence the Court will not order a further accounting, but rather will now go on to examine only those areas which have been drawn into contention.

Based upon this Court's review of the evidence, as earlier noted the Court finds that Mr. Dobish exclusively handled his own financial affairs up until he suffered a stroke in August 2009. Thereafter Dorice wrote checks from his living trust account. Darin primarily questions two areas of those expenditures, the first dealing with the payment of real estate taxes, and the second dealing with improvements made to the home.

As to the payment of real estate taxes, the Court finds that on December 11, 2009 Dorice issued a check to the City of Garfield in the amount of $3,006.00 in payment of the first half 2010 real estate taxes. At that time she knew both that her father had just passed away and that he had recently conveyed the home to her. While Dorice attempted to justify this on the basis that Darin had advised her to pay all taxes and other bills that she was able to, even if this were the case Darin was unaware that the home had previously been conveyed to Dorice. Further on cross-examination Dorice conceded that her father never benefited from this expenditure. Additionally the Court finds that Dorice wrote check number 2505 on January 4, 2010 in the amount of $375.00 for dues and taxes on property in Pennsylvania which she owned jointly with her father which appears passed to

her automatically by operation of law.

With respect to improvements made to the Garfield home by Dorice following her father's stroke, the Court accepts as credible Dorice's testimony that she ultimately hoped and expected that her father would return to live in the house. The Court accepts her testimony that she applied, and was approved for, funding from the Traumatic Brain Injury Fund which would allow her father to receive $15,000 on a yearly basis to make improvements or changes to the home, but that this funding was ultimately never received due to her father's passing. (P-43).

The Court also accepts as credible Dorice's belief that whenever Mr. Dobish returned home he would be wheelchair bound, and hence some doorways in the residence needed to be widened to accommodate the wheelchair. In fact, Darin admitted in his testimony that Dorice widened the doorways to the dimensions of a wheelchair. Hence, expenditures related thereto in order to accommodate Mr. Dobish's return to the home, in which he retained a life estate, are hereby expressly approved.

More questionable, however, are the repairs and improvements made to the kitchen, several of which undeniably benefited solely Dorice and not her father, as she candidly conceded. These included check numbers 107 for kitchen tile ($950.21), 112 and 114 for granite counter top ($400.00 and $500.00), 115 for kitchen ($840.00) and 125 for new appliances ($3,112.56). Additionally she expended $441.98 via check number 122 for payment of her personal credit card debt.

Article A, Section 4 of decedent's Durable Power of Attorney (P-8) expressly provided Dorice with the power and authority to alter, repair and improve decedent's real estate. While Mr. Dobish maintained a life estate in the property although he was no longer vested with title, which would arguably justify any reasonable and necessary improvements, the Court finds that the expenses cited did not inure to nor were they intended for decedent's benefit, and exceeded Dorice's scope of authority under the Power of Attorney. Accordingly as an appropriate remedy, and in accordance with Darin's request, the Court will order Dorice to pay back into the estate those expenses ($6,244.75) as well as the improper real estate tax payments ($3381), for a total of $9,625.75 which must be repaid back to the estate.

Darin also referred during his testimony to a large amount of cash which his father kept in his safe and showed him on one occasion in March 2009. According to Darin, Mr. Dobish said there was some $25,000 in the safe and that if he ever needed anything Dorice had the combination. However, in or around the same time period Mr. Dobish appears to have given Darin $15,000 for a

car loan. While Darin testified that this may have occurred in April or May 2009 and that his father said he had money in the safe and would go get it, Mr. Dobish's notes (P-31) reflect a $15,000 cash loan to Darin on February 27, 2009. Dorice testified that she deposited in the bank all of her father's cash that she was able to locate on September 6, 2011. (D-10). The Court notes that the amount of cash deposited, i.e. $8,835, is roughly equivalent to the difference between the $25,000 approximate cash amount which decedent indicated to Darin he possessed, less the $15,000 cash loan made to Darin. In any event, the Court finds that Dorice has accounted for the decedent's cash balance, and that Darin failed to sustain his burden that an additional cash balance existed beyond that reported by Dorice.

Finally, while some fleeting reference was made in Darin's testimony as to jewelry, he did not specifically allude to any items or values, and no further issue was made of this during the trial. To the extent that this remains a bone of contention, Dorice shall be required to account for any of decedent's jewelry prior to the ultimate distribution of decedent's estate.

V. ATTORNEY'S FEES

Generally under the so-called American rule, each party must bear their own attorney's fees. See, e.g., Litton Industries v. IMO Industries, 200 N.J. 372, 385 (2009); Mason v. City of Hoboken, 196 N.J. 51, 70 (2008). Exceptions however have been established by Rule and by statute, and Rule 4:42-9 (a) specifically designates eight such fee-shifting exceptions. In particular, Rule 4:42-9 (a) (3) provides, in relevant part:

> "In a probate action, if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate."

The allowance of counsel fees in a Will contest under Rule 4:42-9(a) (3) is discretionary. In re Reisdorf, 80 N.J. 319, 327 (1979). "Except in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute." In re Reisdorf, supra, 80 N.J. at 326. An unsuccessful contestant is entitled to costs when he or she shows "reasonable cause" for bringing a probate challenge, defined as a belief that "rested upon facts or circumstances sufficient to excite in the probate court an apprehension that the testator lacked mental capacity or was unduly

influenced[.]" In re Will of Caruso, 18 N.J. 26, 35 (1955); accord In re Will of Eddy, 33 N.J. Eq. 574, 578 (E. & A. 1881). This requirement "`works no hardship upon the contestant and affords some protection to the estate from speculative and vexatious litigation.'" In re Caruso, supra, 18 N.J. at 35 (quoting In re Sebring's Will, 84 N.J. Eq. 453, 455 (Prerog. Ct. 1915)).

The Court finds that based on Darin's own testimony there was no reasonable basis to contend that his father ever lacked the appropriate mental capacity. As previously noted, the Court has also determined that the proofs advanced by Darin on the issue of undue influence were weak at best. Hence, if defendant's challenge was simply designed to void the 2009 documents based on these grounds the Court would not hesitate to deny defendant's counsel fee application in its entirety. However defendant was successful, in part, in challenging the accounting of certain improper expenditures by Dorice which the Court has ordered be restored to the estate. To this limited extent, then, counsel's services have created a fund which has inured to the benefit of the estate and it is also on this basis that the Court concludes that defendant is thus entitled to a limited counsel fee award.

The Court further finds that throughout the course of this litigation and trial the primary focus was on defendant's unsuccessful efforts to challenge the validity of the 2009 documents. Certainly less time and effort was focused on the accounting issue, as to which defendant enjoyed partial success. The Court reasonably estimates that approximately 20% of the services rendered should be attributed to the accounting issue. Having reviewed the Affidavit of Services submitted by defendant's counsel, the Court finds the time expended and counsel's billing rate to be fair and reasonable and in accordance with the rates customarily charged for similar services by lawyers of reasonably comparable skill, experience and reputation in the area. Accordingly, the Court hereby awards defendant attorneys fees of 20% of the $60,843.75 demanded, or $12,168.75. Having reviewed the itemization of expenses also requested by counsel, many of them deal with items such as postage and copying costs which the court disallows as part of office overhead. The Court does, however, allow 20% of the filing and service fees of $400.00 and deposition costs of $2,867.55, hence bringing the total award of counsel fees and costs payable to defendant's counsel by the estate to $12,822.26.

Plaintiff has also requested an award of counsel fees in the amount of $76,595.50 plus costs of $764.15. Since plaintiff was successful in sustaining the validity of the 2009 documents, an award of counsel fees related to those efforts is proper. Again, however, since plaintiff was determined to have at least in part acted inappropriately in her fiduciary capacity with respect to the

payment of real estate taxes and kitchen improvements, from which the estate would have otherwise suffered, plaintiff should not in essence be rewarded for such conduct. Accordingly the Court will deduct 20% of the requested counsel fee award. Once again the Court has reviewed the Affidavit of Services submitted by plaintiff's counsel and finds the time expended and the hourly billing rate to be fair and reasonable, except that the Court will deduct therefrom three hours of Mr. Cevasco's time on January 17, 2012 inasmuch as he appeared as a witness at that time, as well as the $75.00 and $243.00 amounts attributable to Eimi Figlio, Esq. and paralegal Katie Miedler, as the necessity for their services has not been adequately established. Accordingly, plaintiff is hereby awarded 80% of the $75,302.50 approved counsel fee and $764.15 costs, for a resulting award of counsel fees and costs in the amount of $60,853.32.

CONCLUSION

For the reasons set forth above, the Caveat filed by Darin K. Dobish on December 22, 2009 is discharged, and the First, Second, Third and Fourth Counts of his Counterclaim are dismissed with prejudice. The decedent's May 14, 2009 Will is admitted to probate, and plaintiff Dorice Dobish shall be appointed Executrix and the Surrogate shall issue Letters Testamentary to her upon qualification.

Dorice Dobish shall forthwith restore the sum of $9,625.75 to the estate. Counsel fees and costs in the amount of $60,853.32 are hereby awarded to plaintiff and $12,822.26 to defendant. The Court has simultaneously entered Judgment consistent with this opinion.

Dated: February 16, 2012

HARRY G. CARROLL, J.S.C.