

**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

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**In the Matter of the Application of HUA WANG a/k/a
JUDY WANG, for a Determination of Her Right under
Section 5-1.1-A of the Estates, Powers and Trusts Law
to Elect to Take an Intestate Share against the
Provisions of the Last Will and Testament of**

IRVING BERK,

Deceased.

DECISION

File No. 2488C-2006

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I N G R A M, A. S.

In the above-entitled contested proceeding, Hua Wang a/k/a Judy Wang (hereinafter petitioner) seeks a decree determining that 1) she is entitled under the provisions of EPTL 5-1.1-A to elect to take her elective share of the estate of Irving Berk (hereinafter decedent) and 2) the notice of election served and filed herein with the clerk of the court has been properly served, filed and recorded as provided by law. Harvey Berk and Joel Berk (decedent's sons and hereinafter referred to collectively as the co-executors) opposed petitioner's petition in an answer wherein they alleged, *inter alia*, that the marriage of petitioner to decedent was the product of undue influence and that decedent lacked the requisite mental capacity to enter into a marriage contract.

In 1997, petitioner was hired as decedent's live-in caretaker. Decedent was about 91 years old at the time. On June 17, 2005, petitioner (who was almost 48 years old) and decedent (who was 99 years old) married in a ceremony at the New York City Clerk's Office.

On June 16, 2006, decedent died. On October 30, 2006, decedent's

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will was admitted to probate in this court and letters testamentary were issued to the co-executors. Petitioner received no bequest under decedent's will.

On December 4, 2017, a 37-day trial commenced in this matter with the last witness testifying on February 26, 2018. Summations were held on May 9, 2018. The trial transcript is approximately 5,000 pages. Over 30 witnesses testified in person or by deposition and well over 100 exhibits were received in evidence. This Court must determine the following issues.

1) Did petitioner know that decedent was mentally incapacitated and incapable of consenting to the marriage? 2) If so, did petitioner take unfair advantage of decedent by marrying him for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse, at the expense of the intended beneficiaries? 3) In the alternative, did petitioner, as decedent's caretaker, exercise undue influence upon decedent to induce him to marry her for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse, at the expense of the intended beneficiaries (*see Matter of Berk*, 133 AD3d 850 [2d Dept 2015])?

A person is presumed to be competent at the time of the performance of the challenged action and the burden of proving incompetence, by a preponderance of the credible evidence, rests with the party asserting incapacity (*Thomas v Gray*, 121 AD3d 1091 [2d Dept 2014]; *Matter of Berk*, *supra*). The standard of capacity for marriage is whether the person was

able to understand the nature, effect and consequences of the marriage (*Levine v Dumbra*, 198 AD2d 477 [2d Dept 1993]). Marriage is a civil contract, to which the consent of the parties capable in law of making a contract is essential (DRL 10).

In this matter, petitioner argues that decedent was fully capable of entering into a marriage at the time of his nuptials with her. She argues that he continued to work up until shortly before his demise and was able to attend to and continue to run his business at the Berk Trade and Business School. She also argued that he was able to attend and participate in family functions. The co-executors argue the opposite. They argue that decedent was the victim of the slow fog of dementia that started to creep into his life and robbed him of the capacity to understand the effects of entering into a marriage with petitioner.

The record is replete with credible evidence that decedent suffered from both physical and mental impairments. Among other things, in 1999, decedent suffered from a stroke and was hospitalized several times between 1999 and the date of his death for a number of physical ailments. Moreover, the record contains ample evidence that decedent suffered from significant hearing loss. In February 2005, decedent was hospitalized for gall bladder surgery at which time it was noted in hospital records that decedent experienced periods of confusion. In February 2005, decedent met with Sayward Mazur, Esq. (hereinafter Mazur), an attorney who was representing him in a landlord/tenant matter. Mazur testified that he had

significant concerns regarding decedent's competency and ability to meaningfully participate in the prosecution of the matter for which he was retained. Mazur's concerns about the decedent's competency were so grave that he considered the appointment of a guardian for decedent. Mazur eventually recommended that a guardian ad litem be appointed for decedent in the landlord/tenant matter. On June 16, 2005, decedent was unable to accurately complete the marriage license application and made critical mistakes including, among other things, decedent's address, his place of birth, and his mother's maiden name. In a photograph taken on decedent's wedding day, decedent appeared unsmiling and looked dazed and/or confused.

While the parties presented vastly contrasting evidence of decedent's physical and mental condition, the above-specified instances are only a few of the examples of the plethora of credible evidence presented that decedent suffered from diminished mental capacity that rendered him incapable of understanding the nature, effect and consequences of the marriage to petitioner or consenting to the marriage.

Moreover, this Court finds it impossible to believe that petitioner did not know of decedent's mental incapacity. Petitioner, in essence, was decedent's primary caretaker from 1997 until his death. During that time, petitioner was present during decedent's doctor's visits and numerous hospitalizations. The record also reflects that during her tenure as

decedent's caretaker, petitioner was with decedent during a significant portion of each day where she would interact with him and she had ample opportunity to observe his actions, his daily routine and interactions with others. Also, petitioner had experience in the medical field. Prior to immigrating to the United States in 1996, petitioner, an ophthalmologist, worked in a hospital in China. With petitioner's medical experience and her constant care of decedent, this court's finds that she knew decedent lacked the capacity to consent to marry her.

An alternate ground for forfeiture of the right of election is whether petitioner, as decedent's caretaker, exercised undue influence upon decedent to induce him to marry her for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse, at the expense of the intended beneficiaries (*see Matter of Berk, supra*). To establish undue influence, the co-executors must prove, by a preponderance of the credible evidence, that (1) the perpetrator had the motive to exercise undue influence; (2) the perpetrator had the opportunity to exercise undue influence, and (3) undue influence was actually exercised (*see Matter of Bianca*, 195 AD2d 457 [2d Dept 1993]; *Matter of Berk, supra*). The party alleging the undue influence must show that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained decedent to do that which was against his free will and desire, but which he was unable to refuse or too

weak to resist (*see Matter of Capuano*, 93 AD3d 666 [2d Dept 2012]).

The testator's physical and mental condition are critical factors in determining whether the pressure exerted amounts to undue influence (*Matter of O'Brien*, 182 AD2d 1135 [4th Dept 1992]; *Children's Aid Society v Loveridge*, 70 NY 387 [1877]; *Matter of Woodward*, 167 NY 28 [1901]; *Matter of Callahan*, 155 AD2d 454 [2d Dept 1989]; *Matter of Gnirrep*, 2 AD2d 404 [3d Dept 1956]; *Matter of Streb*, 247 App Div 556 [4th Dept 1936]). Similarly, the nature of grantor's relationship with the beneficiary is relevant to whether undue influence was exercised (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Other factors that have been held to indicate the exercise of undue influence are whether the professional who drafted the document involved in the transaction was chosen by decedent (*see Matter of Elmore*, 42 AD2d 240 [3d Dept 1973]); whether the person who allegedly wielded undue influence was in a position of trust (*Id.*), and whether decedent was isolated from the objects of his natural affection (*see Matter of Burke, supra*; *Matter of Kaufman*, 20 AD2d 464 [1st Dept 1964], *affd* 15 NY2d 825 [1965]).

As previously stated, this Court finds that decedent suffered from diminished capacity at the time of his marriage as evidenced from the record before the court. Further, as decedent's caretaker, petitioner maintained a confidential relationship with decedent, wherein he was dependent upon petitioner to help him meet his needs of daily living (*see Matter of Arnold*, 125 Misc 2d 265 [Sur Ct, Bronx County 1983]). Once it is

shown that a confidential relationship existed between petitioner and decedent, an inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction (*Bazigos v Krukar*, 140 AD3d 811 [2d Dept 2016]).

Petitioner's allegations regarding the romantic and loving relationship that developed between decedent and petitioner were insufficient to convince this court. In fact, this Court found petitioner's testimony substantially incredible on material issues.

However, even without an inference of undue influence, there was evidence of the influence exerted over decedent by petitioner. All of the parties that prepared documents related to the marriage in time and/ or subject matter (other than petitioner, decedent and city officials) appeared to be chosen by petitioner. Petitioner chose 1) Jing Kang to assist petitioner and decedent in the administrative processes of obtaining a license and getting married; Ms. Kang also served as witness to the marriage; 2) Jacqueline Rayfield, Esq. to prepare a post-nuptial agreement; 3) Yuming Wang, Esq. to prepare a "gift certification" (relating to certain inter vivos gifts from decedent to petitioner) and a "limited power of attorney" (relating to the Berk Trade and Business School) in the months shortly before the marriage and 4) Walter Chin (a Notary Public) to notarize various documents purportedly signed by decedent. Although Notary Chin only saw decedent twice in his lifetime, upon the request of petitioner, Notary Chin summarily executed and affixed his notary stamps and

signature to a number of documents on various dates that were purportedly signed by decedent without Notary Chin actually witnessing decedent sign the document. Under the circumstances herein, it appears incredible to this court that decedent, if competent, would not have taken a more active role in choosing the professionals for the drafting of legal documents regarding decedent's property and certain gifts made by him in light of his access to, and probable knowledge of, various legal professionals in his extensive real estate and business dealings throughout the years.

While decedent was not isolated from his family, petitioner did have a great deal of control over the people in decedent's life who helped care for him on a daily basis. The record reflects that decedent met with the co-executors on a regular basis. He also regularly attended family functions. However, petitioner, as decedent's live-in caretaker, was decedent's daily companion who took care of his daily needs. Even more troubling to this Court was the evidence that showed that during decedent's last years, petitioner hired a substitute caretaker to take her place when she was away or otherwise unable to be present to care for decedent herself, such as during visits with her family in China. Essentially, petitioner had control of decedent's daily needs, even when she was not in decedent's presence or in the country.

In addition, the credible evidence showed that the marriage between decedent and petitioner was kept secret until after decedent's death. After the marriage, petitioner even failed to disclose to decedent's physicians that

she was decedent's spouse. In fact, while en route to the funeral home following decedent's death in June 2006, petitioner revealed to the co-executors that she had married their father in June 2005. Most telling of the great influence that petitioner had over decedent was a number of notes in evidence that were written by decedent that appeared to be clearly written at the direction of petitioner. The notes in evidence appeared to be dictated by petitioner. The notes appeared to have been in decedent's handwriting, but contained the unmistakable undertones of petitioner's voice. Petitioner's counsel even conceded during summations that the aforementioned notes contained the "diction" or "dialect" of petitioner.

The evidence presented shows consistent, insidious and duplicitous conduct that led to petitioner's clandestine marriage to decedent. As decedent's live-in caretaker, petitioner had ample motive and opportunity to influence decedent's actions. In light of the evidence of the actions of decedent in this matter, it is crystal clear that petitioner actually exercised undue influence over decedent in entering into a marriage with him.

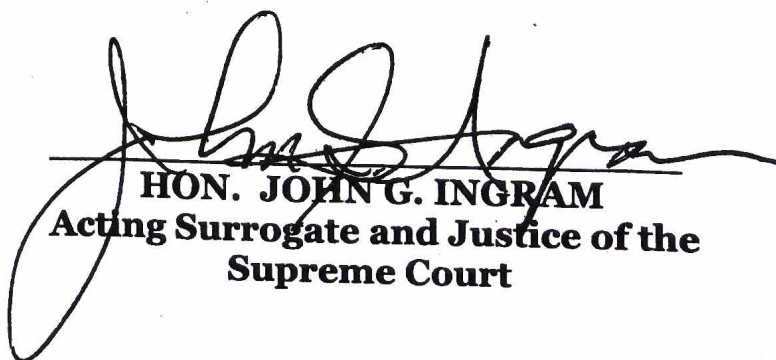
It is well settled that no one shall be permitted to profit from his/her own fraud, or take advantage of his/her own wrong, or to base any claim upon his/her own iniquity, or to acquire property by his/her own crime (see *Riggs v Palmer*, 115 NY 506 [1889]). Where a marriage has been wrongfully procured, the statutory right of election which would have been the benefit of such marriage will be forfeited (*Campbell v Thomas*, 73 AD3d 103 [2d Dept 2010]).

Therefore, this Court finds that, based upon the credible evidence, petitioner knew that decedent was mentally incapacitated at the time of their marriage, and entered into marriage with decedent to obtain the pecuniary benefits of said marriage at the expense of the beneficiaries. This Court further finds that, even if the petitioner was competent, the co-executors have proven by the preponderance of the credible evidence that petitioner exercised undue influence over decedent to induce him to marry her for the pecuniary benefits that became available by virtue of being decedent's spouse, at the expense of the beneficiaries. Thus, through her wrongdoing, petitioner has forfeited her right to take the elective share of decedent's estate as decedent's surviving spouse.

Accordingly, based upon the record, petitioner's petition for decree determining that she is entitled under the provisions of EPTL 5-1.1-A to elect to take her elective share of decedent's estate is hereby denied. Decedent's petition for a decree determining that the notice of election served and filed herein with the clerk of the court has been properly served, filed and recorded as provided by law is also denied as moot.

Settle order.

Dated: Brooklyn, New York



HON. JOHN G. INGRAM
Acting Surrogate and Justice of the
Supreme Court

Hon. John G. Ingram
Acting Surrogate

JUN 27 2018