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

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Probate Proceeding, Will of File No. 335789

MATTHEW PELKISSON, Decision No. 112

Deceased.

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In this contested probate proceeding, the petitioner moves for summary judgment dismissing the objections and admitting the will to probate; the motion is opposed by the objectant. For the reasons that follow, the motion is granted.

The decedent Matthew Pelkisson died on September 5, 2004 survived by his two adult children: the proponent Arlene Nathan and the objectant Beverly Samuels. The propounded instrument, which is dated April 4, 1987, bequeaths the entire estate to Arlene. Article SEVENTH of the will provides, "I know that I have a duaghter (sic) BEVERLY SAMUELS, but I have knowingly and intentionally made no provision in this will for her."

Objections to the propounded instrument were timely filed on November 21, 2005. The papers filed in support of the motion for summary judgment contain copies of the depositions of Norman Sarnoff, the attorney draftsman and attesting witness, and Ruth Sarnoff, Norman Sarnoff's wife, who is the other attesting witness. The objections are limited to the issues of testamentary capacity and undue influence, there being no objection that the will was not duly executed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the

sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment in contested probate proceedings is appropriate where a contestant fails to raise any triable issues of fact regarding execution of the Will, testamentary capacity, undue influence, or fraud (*see, e.g., Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]).

The proponent bears the burden of proof on the issue of testamentary capacity (3 Warren's Heaton on Surrogates' Courts, § 42.06[1], 7th ed.). To satisfy this burden it must generally be shown that the testator understood the consequences of making a will, knew the nature and extent of the property being disposed of, and knew who were the natural objects of his bounty and his relationship to them (*Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of DiCorcia*, 35 AD3d 463 [2d Dept 2006]). The affidavits and deposition testimony of the attesting witnesses and the attorney draftsman who supervised the will's execution are sufficient to create a presumption of testamentary capacity (*Matter of Janes*, 17 AD3d 366 [2d Dept 2005]; *Matter of Williams*, 13 AD3d 954 [3d Dept 2004], *appeal denied* 5 NY3d 705 [2005]).

In opposition to the proof of testamentary capacity submitted by the proponent, the objectant relies on the affirmation of her attorney to rebut the proponent's prima facie case. Ordinarily, the affidavit or affirmation of an attorney without personal knowledge of the underlying facts is insufficient to overcome a summary judgment motion where a prima facie case has been made out (*GFT Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965

[1985]; *Matter of Makudera,* 115 AD2d 936 [3d Dept 1985]). Here, counsel has personal knowledge of the testimony taken at the deposition, but no personal knowledge of the circumstances surrounding the execution of the propounded will in 1987. The opposition to the motion is therefore insufficient on this ground alone. But, even if it were not so, counsel's affirmation is silent on the issue of testamentary capacity. There being, therefore, no opposition to that branch of the motion, proponent is entitled to summary judgment on the issue of testamentary capacity.

The burden of proof on the issue of undue influence is on the objectant. To overcome a motion for summary judgment where the movant has made out a prima facie case, the party moved against must do more than simply obfuscate the issues (*Shah v Shah,* 215 AD2d 287 [1995]; *Saks v New York City Health & Hospitals Corp.,* NYLJ, Jan. 16, 2004 at 18, col. 1), she must present evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Even viewing the evidence in a light most favorable to the objectant, as the court must (*J.E. v Beth Israel Hospital,* 295 AD2d 281 [2002]), the proponent is still entitled to summary judgment. A motion for summary judgment requires the party moved against to lay bare all his proof and the failure to show the existence of a bona fide issue for trial requires the court to grant the motion (*In re Dissolution of Rencor Controls, Inc.,* 263 AD2d 845 [1999]). The only "evidence" offered is that the proponent contacted the attorney who drew the will and drove the testator to and from the attorney's office. It is often held that the objectant on the issue of undue influence must show not only motive and opportunity to exercise undue influence, but also some evidence that undue influence was actually exercised (*Matter of Fiumara,* 47 NY2d 845 [1979] ; *Matter of Nofal,* 35 AD3d 1132 [3d Dept 2006]; *Matter of Bustanoby,* 262 AD2d

407, 408 [2d Dept 1999]; *Matter of Coniglio*, 242 AD2d 901 [4th Dept 1997]) . Here, it appears that the testator had been living with the objectant for a period of 16 years prior to the will's execution in a home which they owned as tenants in common. The mere fact that the proponent arranged for the meeting with the attorney draftsman and drove the testator to and from the attorney's office does not, standing alone, justify giving this issue to a jury, especially where there was a lapse of 17 years between the execution of the instrument and the testator's death during which time the testator had more than ample opportunity to modify or revoke his will, if that was his wish. Accordingly, the motion is granted to the extent that the objections are dismissed and the propounded will be admitted to probate.

Settle decree on five days' notice with five additional days if service is by mail.

Dated: March 22, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court