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

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Probate Proceeding, Will of

BERTHEL RENNERT,

Deceased.

File No. 321831

Dec. No. 133

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In this contested probate proceeding, the proponent, Martin Rennert, has moved for an order granting summary judgment pursuant to CPLR 3212, dismissing the objections filed by the objectant, Yvonne Guttmann, and admitting the propounded instrument to probate. Yvonne opposes the motion on the ground that material issues of fact exist. The motion is granted in part and denied in part.

BACKGROUND

The decedent, Berthel Rennert, died testate on December 10, 1999, at the age of 86. She was survived by her son, Martin, and by her two daughters, Ruth Rennert and Yvonne Guttmann. The decedent's children are her sole distributees.

The instrument offered for probate is dated June 4, 1998. If the propounded instrument is admitted to probate, Ruth and Martin will each receive fifty per cent of the proceeds from the sale of the decedent's home. Additionally, Ruth will receive two-thirds of the residuary estate and Martin will receive the remaining one-third of the residuary estate. The instrument also contains nine pre-residuary bequests, one to a friend and the remainder to relatives of the decedent.[1] The propounded instrument specifically disinherits Yvonne. If the instrument is

[1]Yvonne's two children receive $1,000 each under the terms of the propounded instrument.

denied probate, the three children will share equally (EPTL 4-1.1 [a] [3]), there being no evidence of any other will.

Ruth is the nominated executrix under the propounded instrument. She renounced the appointment and consented to having letters testamentary issue to Martin, the nominated alternate executor, who has been appointed as preliminary executor.

Yvonne's objections allege that the propounded instrument was not executed in accordance with the prescribed statutory formalities; that the decedent lacked testamentary capacity; and that the alleged execution of the propounded instrument was procured by fraud and undue influence.

SUMMARY JUDGMENT

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]); *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). If there is any

doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge, Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

DUE EXECUTION

In a probate contest, the proponent has the burden of proof on the issue of due execution (*Matter of Stegner*, 253 App Div 282, 284 [2d Dept 1938], citing *Delafield v Parish*, 25 NY 9, 29, 34 [1862]). The principal statutory requirements are: the testator must sign at the end of the instrument in the presence of at least two attesting witnesses, or his signature must be acknowledged by him to each of the witnesses; the testator must declare to the witnesses that the instrument to which his signature is affixed is his will and that he wishes them to act as witnesses to its execution; and the attesting witnesses must, within one thirty-day period, both attest the testator's signature, as signed or acknowledged before them and at the request of the testator (EPTL 3-2.1). The supervision of a will's execution by an attorney gives rise to an inference of due execution (see e.g. *Matter of Finocchio*, 270 AD2d 418, 419 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586, 587 [2d Dept 1984]). Additionally, a validly executed attestation clause

serves as prima facie evidence that the instrument was properly executed (*Matter of Collins*, 60 NY2d 466, 471 [1983]; 3 Warren's Heaton on Surrogates' Courts § 42.05 [4], at 42-77 [7th ed 2006]).

The propounded instrument contains an attestation clause, and its execution was supervised by the attorney-draftsman, Marvin H. Leicher, Esq.[2] In addition, the SCPA 1404 testimony of Mr. Leicher and two attesting witnesses establishes that it was executed in conformity with the governing statute.

The will was executed on June 4, 1998 at Mr. Leicher's office. Mr. Leicher testified that, prior to the execution ceremony, he reviewed the will with the decedent, who, according to Mr. Leicher, read it. Mr. Leicher further testified that he asked the decedent, "Are these your desires as I put them into final form?" The decedent answered, "Yes." Mr. Leicher then called the three attesting witnesses into the room. According to his testimony, he asked the decedent in front of the witnesses if this was her last will and testament, and the decedent indicated that it was. Mr. Leicher stated that he asked the decedent to initial each page and then to date and sign the will. Mr. Leicher testified that the witnesses then signed the will.

Michael Steindam,[3] one of the attesting witnesses who was examined, testified that, during the execution ceremony, Mr. Leicher asked the decedent whether this was the will she had asked him to prepare, to which the decedent answered, "Yes." Mr. Steindam also testified that

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[2]The court was not supplied with the complete transcript from Mr. Leicher's SCPA 1404 examination; however, it appears that Mr. Leicher is related to the decedent. Additionally, he testified that he "had known Berthel a long time."

[3]Although the court was not furnished with Mr. Steindam's complete transcript, it appears that his wife's mother is Mr. Leicher's sister.

Mr. Leicher asked the decedent whether the will reflected her testamentary desires, and again the decedent answered in the affirmative. Additionally, Mr. Steindam testified that Mr. Leicher asked the decedent whether she would like the witnesses to witness her will, and, once again, the decedent answered, "yes." Mr. Steindam stated that he witnessed the decedent initial the first four pages of the will and sign her name at the end of the will, all at Mr. Leicher's instruction. He testified that he believed the decedent handwrote "4th" before the words "day of June, 1998" prior to signing her name.

Nelson Nieves, another attesting witness, testified that the decedent acknowledged, in response to a question by Mr. Leicher, that the will represented her wishes. He also testified that he saw the decedent sign the will and that he, Mr. Steindam and Joseph Fitzgerald, the third attesting witness, also signed it.

The court finds that Martin has made a prima facie showing of entitlement to summary judgment on the issue of due execution of the propounded instrument. Yvonne's papers in opposition to the motion are devoid of any discussion about due execution. Indeed, the entire record is devoid of any evidence that the instrument was not properly executed. Because all of the statutory requirements were met, and Yvonne having failed to raise a material issue of fact, Martin's motion for summary judgment is granted regarding due execution, and the objection alleging lack of due execution is dismissed.

TESTAMENTARY CAPACITY

The proponent also bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew

the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural object of her bounty and her relations with them" (*id.*). Moreover, sanity and testamentary capacity are presumed unless there is evidence to the contrary, the presumption being that "a mind once sound continues" to be so (*Matter of McCarthy*, 269 App Div 145, 152 [1st Dept 1945], *affd* 296 NY 987 [1947]).

In this case, the testimony of the attorney-draftsman and the subscribing witnesses establishes a prima facie case that the decedent possessed testamentary capacity when she executed the will. Mr. Leicher testified that on June 4, 1998, prior to the execution ceremony, the decedent read the will for "15 minutes" and that she "looked fine" to him, except for "some shortness of breath." Mr. Leicher's testimony reflects that the decedent responded appropriately to Mr. Leicher's questions and instructions about the will's execution. Mr. Steindam testified that she seemed alert and coherent, was responsive to Mr. Leicher, "was certainly talking in the English language with no hesitation when I was in the room on June 4, 1998" and "there was nothing that struck me as her being impaired in any way from making a decision as to what she wanted to do with her assets through a will." Mr. Nieves testified that nothing about the decedent was unusual and that she responded appropriately during the execution ceremony.

In opposition, Yvonne asserts that the decedent lacked testamentary capacity on the date she signed the propounded will. Yvonne relies on, among other things, decedent's medical records from April 1995, more than three-years prior to the time the will was executed, and September 1998, three months after it was executed, to support her position.

In April 1995, the decedent was hospitalized for severe edema and cellulitis at Mt. Sinai Hospital in New York City. According to the hospital records, on April 17, 1995, she was

evaluated by a psychiatrist after her family related to her attending physician that she "had had marked mood swings, espec[ially] of restless, expansive & euphoric moods & at other times has appeared lethargic & depressed." The psychiatrist noted his impressions as "manic disorder " and prescribed Haldol and other medications. The records contain a notation by the decedent's attending physician that she refused to take the medications. There are additional notations in the records that the decedent remained manic and non-compliant to doctors' orders. There are notes on April 18, 1995 that she was "[a]gitated, restless & manifesting paranoid ideation (conspiracy against her by nurses)" and was still refusing to take Haldol. Further, decedent was noted to be in a "hypomanic state [with] paranoid ideation." On April 19, 1995, the psychiatrist's notes state that the decedent was "[i]rritable, garrulous & talking [with] pressured . . . speech. Denies mood changes in the face of evident manic-like states. Also presently denies intent to jump out of window." Other notes from that date state that the decedent was "calm [and] talking coherently."

The medical records from Parker Jewish Geriatric Institute, located in New Hyde Park, New York, dated September 5 and 24, 1998, when decedent was a resident at that facility, define her behavior as a "source of danger and/or distress to oneself or to others." She was noted to "resist[] treatments/therapy [and] medications."

The fact that the decedent was noted to have had psychiatric problems prior to and after she executed the will does not preclude granting summary judgment on the issue of testamentary capacity since the "appropriate inquiry is whether the decedent was lucid and rational at the time the will was made" (*Matter of Buchanan*, 245 AD2d 642, 644 [3d Dept 1997]). Indeed, even proof that a decedent suffered at the time she executed her will from physical or mental infirmities is not

> "necessarily inconsistent with testamentary capacity as long

> as the testatrix was acting rationally and intelligently at the time the [will] was prepared and executed. Furthermore, evidence relating to the condition of the testatrix before or after the execution is only significant insofar as it bears upon the strength or weakness of mind at the exact hour of the day of execution" (Matter of Hedges, 100 AD2d 586, 588 [2d Dept 1984]).

The decedent's mental status prior and subsequent to the execution of the propounded instrument is insufficient to create an issue of fact about her testamentary capacity on June 4, 1998. However, Yvonne also asserts that the decedent lacked an understanding of the nature and extent of her assets at the time she executed the propounded will.

Yvonne relies upon two things to support this contention. First, at his SCPA 1404 examination, Mr. Leicher was asked, "So it was your understanding by the end of that first meeting that approximately 50, and correct me if I'm wrong, about $61,000 in residuary would pass to Ruth as part of the Will of Berthel?" Mr. Leicher answered, "I would say so." According to the Federal Estate Tax Return, the decedent's residuary estate was close to $1,000,000, with the bulk comprised of stock holdings. The question posed to Mr. Leicher asked for his understanding "at the end of that first meeting" with the decedent; Mr. Leicher was not asked what his ultimate understanding was of what Ruth would receive or how he gleaned that information, and does not create an issue of fact about the decedent's testamentary capacity.

However, Yvonne also relies on the fact that the decedent had allowed property belonging to her to be held by the Office of Unclaimed Funds of the New York State Office of the State Comptroller. There are sixty-eight items of property abandoned from 1982 through 1996 listed in a letter from the State to counsel for the estate dated July 12, 2002, including approximately 175 dividend checks, the redemption value of three bonds, nineteen redemption value checks, eleven savings accounts, 300 shares of Mobil Corp. stock, 10 shares of IBM stock, approximately

130 shares of Corestates Financial stock, 600 shares of Bethlehem Steel stock, 300 shares of Beverly Enterprises Inc., 160 shares of Baker Hughes Inc. stock, 182 shares of American President Co. stock, 100 shares of Kirby Corp. stock, 68 shares of Chrysler Corporation stock, 79 shares of YPF Sociedad Anonima stock and various other assets.

Mr. Leicher testified that the decedent told him that she "might have lost" an IRA to New York State for lack of activity. Ruth testified that the decedent knew her worth "down to the last penny" and "knew about [the] abandoned property," which, according to Ruth, the decedent did not consider abandoned, but "being held by New York State." Ruth also testified, however, that she thought Mr. Leicher had told her that the decedent told him she had an estate worth $100,000.

The court finds that the evidence introduced by Yvonne creates an issue of fact about whether the decedent was aware of the nature and extent of her assets at the time she executed the propounded will. Thus, Martin's motion for summary judgment on the issue of testamentary capacity is denied.

UNDUE INFLUENCE

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby*, 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of Fiumara*, 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law: "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency . . . . It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly

offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge*, 70 NY 387, 394 [1877]; *see also Matter of Kumstar*, 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther*, 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v. Loveridge*, 70 NY 387, 395 [1877]; *Matter of Burke*, 82 AD2d 260, 269 [2d Dept 1981]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward*, 167 NY 28, 31 [1901]; *Children's Aid Socy. v. Loveridge*, 70 NY 387, 395 [1877]; *Matter of Callahan*, 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; Matter *of Elmore*, 42 AD2d 240, 241 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v. Loveridge*, 70 NY 387, 402 [1877]; *Matter of Kruszelnicki*, 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke*, 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the natural objects of his affection (*Matter of Burke*, 82 AD2d 260, 273 [1981]; *see Matter of Kaufman*, 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]). Yvonne's attorney's affirmation is not based on personal knowledge and is "without evidentiary value and thus unavailing"

(*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *accord Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]).

Martin asserts that the propounded instrument was a product of the decedent's free will. Yvonne, on the other hand, asserts that the propounded will was the result of undue influence on the decedent by Ruth. In opposition to the motion, Yvonne relies solely on her attorney's affirmation, who asserts only that "issues of fact are present as to . . . undue influence . . . practiced on [the decedent] by Ruth Rennert; and, therefore, summary judgment should be denied" and directs the court to Yvonne's response to Ruth's demand for a bill of particulars. In the response, Yvonne alleges that, at and around the time the will was executed, Ruth was in a fiduciary relationship with the decedent, was her care-giver, made the initial contact with Mr. Leicher,[4] transported the decedent to and from his office, was the liaison between Ruth and Mr. Leicher, attended two meetings of the decedent and Mr. Leicher, and was present at the execution ceremony. In the response, Yvonne also alleges that Ruth had the "opportunity and motive to exercise undue influence over the decedent . . . . " Finally, in the response, Yvonne asserts that a living will was executed at the same time as was the propounded will "in favor of Ruth . . . and Martin . . . [which] may have resulted in the decedent's feeling threatened and helpless to go against the wishes of Ruth . . . in matters concerning the decedent's own last will and testament."

Yvonne's assertion that Ruth was in a fiduciary relationship with the decedent at the time the propounded will was executed is not supported by the record. A confidential relationship may be inferred if one party has disparate power over the other (*Ten Eyck v Whitbeck*, 156 NY 341 [1898]), such as the power of an attorney, guardian, clergyman or doctor, where a

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[4]Mr. Leicher testified that the decedent and Ruth each called him to schedule the initial appointment.

confidential relationship is said to exist as a matter of law (NY PJI 7:56 [citations omitted]). However, the law recognizes that a close family relationship "counterbalances any contrary legal presumption (*id.*, *citing Matter of Walther*, 6 NY2d 49 [1959] [committee and ward were sisters]; *Matter of Moskowitz*, 279 App Div 660 [2d Dept 1951], *affd*, 303 NY 992 [1952] [attorney and client were son and father] [additional citations omitted]) and explanation by the [agent] is not required" (NY PJI 7:56). There is absolutely no evidence that Ruth was in a confidential relationship with decedent prior to or at the time the propounded instrument was executed.[5]

In opposition to the motion, Yvonne also has submitted a memorandum, dated December 9, 1999, prepared by an attorney named Peter Bermas. According to the memorandum, in the spring of 1999, Mr. Bermas visited the decedent, who by this time was a resident of a nursing home. After meeting with the decedent, he prepared and sent to the decedent a draft of a will devising the decedent's residence equally to Ruth and Martin and "creating Part A of 70% in trust for Ruth. . . and Part B outright to Marty. Nothing was done about that will." Mr. Bermas states that, during November 1999 and on December 3, 1999, "Ruthie agitated to have Berthel sign that will (or another will which I had not discussed with Berthel but which Ruthie said Berthel wanted)." The memorandum contains additional statements about Ruth's purported involvement with Berthel's estate planning at that time. The record also contains a hand-written note by Mr. Bermas bearing the date November 26, 1999. "Berthel Rennert" is written at the top, right-hand corner of the page. The note states, "Met RHR [at] dinner and talked to her earlier in the day. I did not deliver any will of Berthel, nor did RHR

[5]Likewise, there is no evidence in the record that Ruth was in a confidential relationship with the decedent after the propounded instrument was signed. Additionally, one does not appoint a fiduciary in a living will.

request any, because RHR now says RHR thinks Berthel [should] bequeath ½ to son & ½ to other daughter, and they will take care of RHR." The memorandum and note post-date the execution of the propounded instrument by approximately eighteen months and do not create a material issue of fact about whether the decedent was unduly influenced to make the propounded will.

At best, Yvonne has shown that Ruth had the opportunity to unduly influence the decedent. There is no evidence of her motive to do so. Even assuming motive, there is absolutely no evidence in the record demonstrating that an issue of fact exits about the "actual exercise" of undue influence practiced by Ruth or anyone else on the decedent in the making of the propounded will. Accordingly, Martin's motion for summary judgment on the issue of undue influence is granted, and the objection alleging undue influence is dismissed.

FRAUD

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of [her] property in a manner different from the disposition [she] would have made in the absence of that statement" (*Matter of Clapper*, 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). Indeed, to defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent

to induce her to make this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (NY PJI 7:60 [2006]). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]).

In opposition to the motion, Yvonne again relies solely on her attorney's affirmation, who asserts that "issues of fact are present as to . . . fraud . . . practiced on [the decedent] by Ruth Rennert; and, therefore, summary judgment should be denied" and again directs the court to Yvonne's response to Ruth's demand for a bill of particulars. The response alleges that, over a period of years, Ruth made numerous fraudulent representations to the decedent, casting Yvonne in a negative light and as having been favored financially by their father. Yvonne also alleges that the statements "may have been accompanied by acts of psychological and emotional manipulation and/or physical violence or mistreatment . . . ."

The record is devoid of any proof that Ruth made any of these statements to the decedent. Indeed, the record does not contain an affidavit by Yvonne or anyone on her behalf having personal knowledge about the allegations. Again, Yvonne's attorney's affirmation is not based on personal knowledge and is "without evidentiary value and thus unavailing" (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *accord Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]). The record contains nothing but Yvonne's "mere conclusory allegations and speculation," which are insufficient to defeat a motion for summary judgment (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). Accordingly, Martin's motion for summary judgment is granted regarding fraud, and the objection alleging fraud is dismissed.

For these reasons, the motion for summary judgment is granted on the issues of due execution, undue influence and fraud and denied as to testamentary capacity.

The parties are directed to appear for a conference on May 9, 2007, at 9:30 a.m., to schedule the matter for trial. .

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

Dated: May 1, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court