

**Matter of D'Antonio**

2009 NY Slip Op 33097(U)

December 18, 2009

Surrogate's Court, Nassau County

Docket Number: 325649

Judge: John B. Riordan

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

-----X  
 Probate Proceeding, Will of File No. 325649  
 GEORGE D'ANTONIO, Dec. No. 643  
 Deceased.  
 -----X

In this contested probate proceeding, the objectant, Daniel Gallucci, the nephew of the decedent, moves for an order pursuant to CPLR 3212 granting summary judgment denying probate to the two propounded wills dated October 19, 2001. The proponent, Gloria Nicosia, cross moves for summary judgment dismissing the objections and admitting the propounded instruments dated October 19, 2001 to probate. The objectant has interposed the following objections to the propounded instruments: undue influence and lack of testamentary capacity. Objectant also seeks to disqualify Gloria Nicosia as executor of the estate pursuant to SCPA 707.

**FACTUAL BACKGROUND**

The decedent, George D'Antonio, died on December 19, 2001, survived by five brothers and sisters and nieces and nephews of predeceased siblings. Proponent Gloria Nicosia petitioned for probate of two instruments dated the same day, October 19, 2001. Both instruments contain the names of Janis Wethly, Karen Ponsiek and Michael Ponsiek as the attesting witnesses and John Ferrante, notary, with a stamp and signature.

Both instruments nominate Gloria Nicosia as executrix; one of them nominates Walter Messina as successor. Both instruments divide the estate equally between these two persons.

As one of the decedent's distributees was incapacitated, a guardian ad litem was appointed to represent her interest in the proceeding. The guardian ad litem's investigation uncovered some potential problems with the probate of the wills. As a result, a settlement was

negotiated and agreed to wherein the guardian ad litem's ward would receive one-seventh of the estate. The settlement was subject to court approval. The settlement, however, was never approved because the guardian ad litem's ward died. While awaiting the appointment of the appropriate fiduciaries to enter into a settlement agreement, this court granted objectant's motion to excuse his default in filing objections (Dec. No. 477, Sept. 5, 2007). Objections were filed on October 30, 2008. There is no allegation that the propounded instruments were not executed in accordance with statutory formality or that they were procured by fraud.

### **THE MOTION AND CROSS MOTION**

In support of the motion to deny probate to the will, the objectant submits the deposition testimony of Karen Ponsiek, Michael Ponsiek, Janis Wethly (witnesses to the will), the affidavits of James Dineen, Kim Tersigni and Michael Tersigni, the guardian ad litem report, affidavits of the proponent dated October 8, 2002 and May 29, 2007 and certain medical records. In opposition and in support of the cross motion to dismiss the objections, the proponent submits her own affidavit, the affidavits of the attesting witnesses, the deposition transcript of John Ferrante (the notary), banking records, and medical records. In opposition to the cross motion, the objectant submits the affirmation of counsel, the affidavit of Nanette A. Konival, tax records and a report of the guardian ad litem. In further support of the cross motion, th proponent submits her own affidavit and various records related to the maintenance and upkeep of the decedent's residence located at 84 Lakeview Avenue, Lynbrook, New York.

A perusal of the respective submissions shows that on the very day his wife Vera died, October 19, 2001, decedent, 92 years of age, executed two wills containing essentially the same provisions, that is, dividing his estate equally between Gloria Nicosia and Walter Messina. Both

beneficiaries came to decedent's home that day and participated in the preparation and execution of the wills, apparently each bringing a form; proponent gave inconsistent accounts as to whether decedent filled in the forms or whether she did. The stated purpose of executing two wills that day was that decedent was unsure as to where he was going to reside in the future, either Connecticut or New York. Proponent also obtained a power of attorney naming herself as attorney in fact. By all accounts, decedent had health problems, was hard of hearing, legally blind and obviously upset and distraught on the day his long-time spouse died. One witness, Michael Tersigni, stated decedent "was incoherent of everything and did not know what was going on around him." The submissions further show that decedent was taken to Franklin General Hospital the day after his wife died. The hospital records state a change in mental status, Alzheimer's Disease; dementia; glaucoma; restraints in place and very restless; patient very confused and does not follow directions. The hospital discharge summary dated October 25, 2001 states a final diagnosis "confusion secondary to dementia." Decedent was transferred from Franklin General to a rehabilitation and healthcare center.

The attesting witnesses (two of whom, the Ponsieks, are related to Walter Messina) state that the decedent asked them to witness his will and they observed decedent sign the will. Each executed a SCPA 1406 affidavit stating that "in all respects [decedent] appeared to be of sound and disposing mind, memory and understanding, competent to make a will, and not under any restraint." The attesting witnesses, however, disagree as to whether the wills were already filled out or whether decedent filled them out.

### **ANALYSIS**

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 a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 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 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]).

### **TESTAMENTARY CAPACITY**

The proponent has the burden of proving testamentary capacity. It is essential that a testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property and his relation to the persons who ordinarily would be the natural objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although he need not have a precise knowledge of his assets (*Matter of Fish*, 134 AD2d 44 [3d Dept 1987]), he must be able to understand the plan and effect of the will, and less mental faculty is required to execute a will than any other instrument (*see Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not

necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Flumara*, 47 NY2d 845, 847 [1979]) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). “However, when there is conflicting evidence or the possibility of drawing inferences from undisputed evidence, the issue of capacity is one for the jury” (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]).

In this case, the court finds that there are issues of fact as to the decedent’s testamentary capacity. It appears that the wills were drafted and executed on the very day that decedent’s wife died; that decedent, who had serious health issues including progressive dementia, was emotionally distraught and in a weakened physical condition; that the medical records of decedent’s admission to the hospital the day after the execution of the instruments show that he was confused and had a change in mental status. Notwithstanding the testimony of the attesting witnesses, there are issues of fact as to the decedent’s testamentary capacity. Accordingly, both the motion and cross-motion on the issue of testamentary capacity are denied.

#### **UNDUE INFLUENCE**

In order to prove undue influence, the objectant must show (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*cf. Matter of Walther*, 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions,

Civil, 7:55). It is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a maker furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without a showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]). Circumstantial evidence is sufficient to warrant a trial on the question of undue influence (*Matter of Pennino*, 266 AD2d 293 [2d Dept 1999]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]).

It is clear that the proponent had the motive and opportunity to exercise undue influence upon the decedent. The evidence shows that decedent's wife died on October 19, 2001, the very day he executed the wills; that he was in a weakened physical condition; that there are inconsistencies as to whether the wills were already filled out by the beneficiaries or whether the decedent filled them out; that the beneficiaries (decedent's niece and nephew by marriage) participated in the preparation and execution of the instruments and that decedent appointed proponent attorney in fact. Whether or not the relationship of the proponent with the decedent is ultimately found to be considered "confidential" (Harris, *New York Estates*, 20:228 [5<sup>th</sup> ed]), the court finds that a question of fact has been raised regarding possible undue influence.

An inference of undue influence arises, requiring the beneficiary under the instrument to explain the circumstances of the bequest, when the beneficiary was in a confidential or fiduciary relationship with the testator and was, in some way, involved in the drafting of the will (*see Matter of Putnam*, 257 NY 140 [1931]). This inference places the burden on the beneficiary to explain the circumstances of the bequest (*see Matter of Bach*, 135 AD2d 455 [1<sup>st</sup> Dept 1987]) and the

adequacy of this explanation presents a question of fact for determination by the jury (*Matter of Bach*, 133 AD2d 455 [1<sup>st</sup> Dept 1987]; *Matter of Hirschorn*, 21 Misc 3d 1113[A] [Sur Ct, Westchester County 2008]). The proponent's affidavit regarding her relationship and interaction with the decedent, offered to explain their circumstances, may not be used in support of her cross motion, because it is clearly excludable at trial (CPLR 4519; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313 [1972]; *Beyer v Melgar*, 16 AD3d 532 [2d Dept 2005], but may be considered by the court in opposition to the motion (*Matter of Vetri*, NYLJ, Feb. 26, 1999 at 32, col 2 (Sur Ct, Kings County)).

Indeed, proponent herself recognizes that there are triable issues. In her affidavit in opposition to the objectant's motion for summary judgment dated June 18, 2009, proponent states:

“[Objectant's] attorney ... would have this court believe that my brother [Walter Messina] and I acted with such deceitful motives, because we brought two will forms, assembled witnesses, actively participated in the preparation and brought about the execution of will (sic) so that only Walter and I would gain as sole beneficiaries of the entire estate, both of us receiving one-half of the estate, the same day that our aunt died, and that such disposition of the estate completely cut out the living natural relatives of George D' Antonio. If I did not know the truth, I would have to agree this sounds suspiciously improper” (emphasis supplied).

Clearly, triable issues of fact exist. Accordingly, that branch of the objectant's motion to grant summary judgment on the issue of undue influence and that branch of the proponent's cross motion to dismiss the objection of undue influence are denied.

With respect to objectants' application to disqualify proponent pursuant to SCPA 707(1)(e), the court need not determine such issue as, if the will is admitted to probate, objectant

would have no standing to challenge proponent's appointment as fiduciary and, if the will is not admitted to probate, proponent would not qualify to serve as fiduciary (SCPA 1001).

The matter is set down for a scheduling conference on January 20, 2010 at 9:30 a.m.

The above constitutes the decision and order of this court.

Dated: December 18, 2009

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court