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

----------x

In the Matter of the Probate of the Estate of

File No. 340342

EDNA C. ZOELLER,

Dec. No. 774

deceased.

----------x

In this contested probate proceeding, the proponent, Sharon Zoeller (a/k/a Sharon Zoeller Heaney) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections of the respondent Cecil May Zubrob and admitting the propounded will dated January 21, 1959 to probate. For the reasons that follow, the motion is granted.

The decedent, Edna C. Zoeller, died on October 25, 2005, a resident of Nassau County, leaving a purported will dated January 21, 1959. The purported will bequeaths the decedent's entire estate to her husband, Philip, if he survives her. If Philip does not survive her, then the decedent bequeaths $500.00 to each of Sharon Zoeller and Betsy Ann Sommers, and leaves the balance of her estate in equal shares to Herbert Wickman and Gustav Zoeller. The purported will provides that if Herbert does not survive the decedent, his share is payable to his wife, Ethel Wickman, and if Gustav does not survive her, his share is payable to his wife, Martha. The decedent's husband, Philip, predeceased her having died on October 14, 2003. In addition, Philip Wickman, Gustav Zoeller and Ethel Wickman all predeceased the decedent. Martha Zoeller post-deceased the decedent having died on July 13, 2006. Sharon Zoeller was appointed administrator, c.t.a. of Martha Zoeller's estate.

By petition verified December 5, 2005, Sharon Zoeller applied for letters of administration c.t.a. with respect to this estate. Objections were filed by Cecil May Zubrod on May 12, 2008. The objections read as follows:

"1. I, Cecil May Zubrod, Respondent an interested party herein, am the first cousin and the closest surviving direct blood relative of the deceased.

I make this objection, upon information and belief, to the probate pursuant to NY CLS SPCA Sec. 1410, of the will dated 21st day of January 1959, being presented to the Court as the last will and testament of my first cousin, Edna C. Zoeller.

2. Since childhood, I have had a close relationship with my first cousin, Edna Zoeller, the deceased in this matter.

3. Edna's mother and my mother were sisters who immigrated together from Sweden. There was a time when she and her mother came to live with my family, while her father was in the army.

Even after they established a separate residence, we kept in touch by corresponding by letter and cards. Neither Edna who was careful with her money, nor I could see the use of telephone calls because of the expense, since we had written each other for many years. This correspondence continued until just before she died, when she became ill. Attached please find some correspondence between us not long before she passed away. See Exhibit C.

4. I was aware that Edna was beginning to get ill and she with help of an [sic] home care worker and social worker were dealing with her daily affairs.

5. I can state with conviction that I believe, that Edna who was meticulous with her affairs would have updated her last Will and Testament prior to her death.

6. She was especially proud of her mother's heirlooms and other valuable possessions and would have made some sort of provision for them as well as her Estate. Many of the possessions in her home were precious to her. I do not believe that the will being offered for probate, expresses her intent to distribute her assets in the way she would have wanted. To allege that these heirlooms do not exist or were junk is an insult to her memory and my entire family.

The court, at the very least, should inquire of the administrator the whereabouts of these items.

> 7. If and when she signed the will which is being presented for probate it was at a time where woman [sic] of my age gave great deference to their husbands' wishes.
>
> When her husband Phil died, she certainly took care of all her affairs and the proposed will and its effect would not be what she had intended.
>
> The very fact that everyone mentioned in the will were [sic] deceased except Martha Zoeller, who was in a nursing home with Alzeimers [sic] would not have been overlooked by Edna. Edna was fully aware of Martha's condition and would not have wanted her estate to be distributed to her in the condition she was in at the time.
>
> 8. I have been informed that she had had another will drafted but I did not discuss these matters with her.
>
> WHEREFORE, the contestant prays that this proceeding be dismissed with costs and that the probate of the paper so propounded be refused and this contestant does hereby demand a trial by jury of all the issues raised by these objections. I object to the probate of the will pursuant to NYCL SPCA Sec. 1410 and I request that the Court and [sic] an examination is requested pursuant to NYSPCA Sec. 1404."

The objections fail to allege any of the necessary grounds to deny probate to the propounded instrument. Instead, the objectant makes vague references to the existence of a later will and missing items of personalty and the notion that the decedent would not have wanted to leave her estate to someone who suffered from Alzheimer's disease. Although the objections are not stated as such, the court will nevertheless treat them as though they allege lack of testamentary capacity, lack of due execution, 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]).

ANCIENT DOCUMENT

A will may be admitted to probate under the ancient document rule. Pursuant to the ancient document rule, when a writing is old, is shown to be in the possession of the natural custodian, and is unsuspicious in appearance, it may be admitted to probate without the requirement of a hearing (*Matter of Miley*, NYLJ, Oct. 29, 2001, at 42 [Sur Ct, Suffolk County]). In New York, a document that is twenty or more years old, may be considered an ancient document (*Matter of Hennessy*, NYLJ, Jan. 27, 2000 at 31 [Sur Ct, Nassau County]). In *Matter of Tier*, 3 Misc 3d 587 [Sur Ct, New York County 2004]), the decedent executed a will in August of 1974 and died in November 2000. The court noted that to apply the ancient document rule, the will must be more than twenty years old, taken from a natural place of custody and be unsuspicious in nature. Also, the fact that an ancient document contains an attestation clause is entitled to great weight in determining whether the will was duly executed (*Matter of Borome*, 6 Misc 3d 1005A [Sur Ct, New York County 2003]).

Here, the decedent's purported will was executed more than 50 years ago in the presence of three (3) attesting witnesses, one of whom was the attorney-draftsman. The purported will contains the signatures of the testator and the three witnesses and has an attestation clause. The two living witnesses identified their own signatures on court-certified copies of the will at their respective SCPA 1404 examinations. In addition, petitioner has submitted the affidavit of Ann M. Mudge, who was a family friend of the decedent for approximately fifty-four (54) years. Ms. Mudge states that prior to death, the decedent advised her that her will was located in the far right hand drawer of her bedroom bureau in her home. Upon learning of the decedent's death, Ms. Mudge went to the decedent's home and found the will in the exact location the decedent had

described. She then delivered the purported will to the then attorney for the estate. She has compared a copy of the instrument offered for probate and states that it is a true and correct copy of the will she delivered to estate counsel.

The purported will was prepared by an attorney, Leland Badler, Esq., who is deceased. On file in the probate proceeding are two affidavits by the attesting witnesses, Jeanette Naher Waldenmayer Spindel and Carol B. Reynolds. Both of them indicate in their affidavits that: (a) they reviewed a court-certified photographic reproduction of the instrument dated January 21, 1959; (b) the instrument was executed under the supervision of Leland Badler, an attorney, and they saw the decedent subscribe her name and declare the instrument to be her will; (c) they signed at the request of the decedent and in her presence and that they saw the other two witnesses sign their names as witnesses; (d) the decedent appeared to be over the age of 18 years, of sound and disposing mind, memory and understanding, competent to make a will, and not under any restraint; (e) the decedent could read, write and converse in the English language and was not suffering from any defect of sight, hearing or speech or any other physical or mental impairment which would affect her capacity to make a valid will.

The SCPA 1404 deposition of Jeanette Waldenmayer Spindel was taken by videotape in Virginia. Ms. Spindel testified that she was employed by the attorney-draftsman as a legal secretary and had no specific memory of the signing of the will and the facts and circumstances surrounding the signing of the will. She testified that Carol Reynolds was a secretary who worked for Leland Badler. Although she did not remember the specifics of the signing of this will, Ms. Spindel did go into Mr. Badler's procedure when supervising the signing of a will. Ms. Spindel testified that she could state that she did see the decedent sign the purported will. She

acted as an attesting witnesses in the presence of Edna Zoeller and the procedure was for Edna Zoeller to acknowledge that she was signing her will. Ms. Spindel further testified that Mr. Badler, who had supervised the will, was deceased.

The deposition of Carol Reynolds was taken at her home on February 25, 2009. Ms. Reynold's testified at her examination that she worked as a legal secretary for Mr. Badler and she did not recall the signing of the will, did not recall Edna Zoeller and could not recall Mr. Badler's procedure for the execution of the will. She was only able to identify her signature.

OPPOSITION PAPERS

In opposition to the motion, the objectant has submitted the affirmation of her attorney and an affidavit by her daughter, Sheila Zubrod. Counsel alleges that the objectant's daughter had many conversations with Ms. Mudge "who was aware of the second more recent will." He states that Ms. Mudge fails to mention this in her affidavit, which raises a question of fact as to the existence of a second will. He annexes four (4) e-mails from Ann Marie Mudge to the objectant's daughter which read as follows:

> **"January 4, 2007**
>
> Hi Sheila,
>
> I received an E-mail from Sister. We had been in touch when she was helping Edna, very nice person. She said Aunt Edna did not like Mr. Tanck, refused to have him handle the will, she took it home with her. So she only witnessed Edna signing for me to be Health Care Proxy, Power of Attorney. As for that will, we will probably never know where it ended up, or who was to get what. I think the estate whenever settled will go to Sharon, and a large portion to Mr. Tanck...
>
> I will call Sister in the next day or two. Have an app't with my son at 3 today.
>
> Take care. Ann Marie

February 21, 2009

Hi Sheila,

The beat goes on! If nothing else, Sharon has patience... The silverware was quite heavy, and old pieces, at least service for 12.. [sic] Aunt Edna told me they were from her mother. The china was beautiful, floral with 24 caret [sic] gold trim. I am not sure if it was "Haviland". She had Llandro [sic] figures, and Hummels. She had a large "Ethan Allen" lamp in the living room. It had been an anniversary gift. She had told me it cost close to $1,000 at that time. At the time Edna offered me the china. I don't think anything should have been touched, but warehoused until this was done.

I hope this was of some help. Keep in touch. Ann Marie

August 11, 2009

Hi Sheila,
Hi Sheila,[sic]

I talked to Sharon's lawyer, I received the avidavit [sic] to sign stating that I saw the will and gave it to Mr. Tanck, and that Sharon is asking to be executor of it. I said I did not want to be involved in that decision, but he said I really had no impact.{which I figured!}. I also said there were valuables, and I wanted it on record I had seen them, but did not know what happened, and wanted him to know I never saw them or ever had any thing to do with them missing. He says the probate is soon I don't expect I will hear from him again. Take care. A."

August 13, 2009

Hi Sheila,

Catching up[on my E-mail. I knew of the will, however, I thought it was a recent one, not 1959...I gave it to Mr. Tanck. I did ask this current lawyer what if I hadn't. He said the estate would have went to court, as it was not necessarily recorded. I tried to be honest, ?? if I had to do it over again.

I don't think I really have an effect one way or another. I feel bad it has turned into such a mess, I wonder what can be left. Pa. still waiting for $, as well as lawyers. I wish Aunt Edna had

> used her money to live a better life, as they say "hindsight 20/20"...I would have acted differently as far as taking the valuables for safe keeping. If nothing else, lesson learned!
> Have a good weekend. Take care A"

In addition, objectant's counsel argues that these e-mails support objectant's claim that there were valuable items of personalty removed from the decedent's home. He also argues that the will was not duly executed as shown by Ms. Reynold's inability to recall either the execution of the will or signing the SCPA 1406 affidavit.

The objectant also submits an affidavit from her daughter, Sheila Zubrod. Ms. Zubrod states that her mother was asked to sign a wavier and consent by Henry Tanck, the original estate attorney, and was sent a check for $50.00, which her mother signed and returned. Ms. Zubrod then notified Mr. Tanck that she wanted the papers signed by her mother returned and he did so. Sheila Zubrod also states that her mother is the decedent's closest living blood relative and they wrote to each other every month for fifty (50) years. Ms. Zubrod further states that there were valuables in the home taken by the petitioner. Ms. Zubrod alleges that she contacted a nun at the decedent's church who said that she had taken the decedent to Mr. Tanck to have a new will drawn up, which was mailed to the decedent to have signed and executed. Sheila Zubrod states that Ann Marie Mudge's omission of "a subsequent will" in her affidavit is "extremely odd."

The objectant has not submitted her own affidavit.

EXISTENCE OF A LATER WILL

The objectant's daughter makes reference to a later will allegedly drafted by Henry Tanck. The court notes that Mr. Tanck was the attorney for the estate who filed and signed the petition offering the January 21, 1959 will for probate. The record is devoid of any evidence that

a later will existed. In addition, the only sworn statement submitted by Ms. Mudge in this proceeding references only the purported will and not a later will.

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 sign their names and affix their residence addresses at the end of the will (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, Surrogate's Court Practice § 42.05 [4], at 42-77 [7th ed 2006]).

Although, neither Ms. Reynolds nor Ms. Spindel recalled the execution ceremony, they did identify their signatures on the will (see *Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]). Moreover, where, as here, the attorney-draftsman supervised the will's execution and, therefore, there arises a presumption that the will was properly executed, "it is well settled that the presumption of execution is not overcome by the

mere failure of attesting witnesses to recall the will execution" (*Matter of Finocchio*, 270 AD2d 418, 418-419 [2d Dept 2000]).

Based upon the record, the court is satisfied that the will was executed in conformance with the statutory requirements of EPTL 3-2.1. The court finds that petitioner has made a prima facie showing of entitlement to summary judgment on the issue of due execution of the propounded instrument. The court has searched the record, and finds that it is devoid of any evidence that the instrument was not properly executed. Because all of the statutory requirements were met and there are no issues of fact requiring a trial, petitioner's motion for summary judgment is granted regarding due execution.

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]). As a general rule and until the contrary is established a testator is presumed to be sane and to have sufficient mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

At her SCPA 1404 examination, Ms. Spindel testified unequivocally that the decedent possessed testamentary capacity on the date she executed the will. She and the other living witness also signed an SCPA 1406 affidavit of attesting witness after the decedent's death in which she swore that the decedent appeared to be of sound mind and memory on the date she executed the will.

Based upon the record, the court finds that petitioner has met her burden of proving that the testator possessed testamentary capacity on the date she executed her will. The objectant has not introduced any admissible evidence that creates a triable issue of fact. Accordingly, petitioner's motion for summary judgment on the issue of testamentary capacity is granted.

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, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. 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]). Indeed, there is absolutely no evidence in the record that anyone unduly influenced the decedent to make or execute the

propounded will. Accordingly, petitioner's motion for summary judgment on the issue of undue influence is granted.

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 (PJI 7:60). 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]).

Again, objectant has failed to demonstrate that a question of triable fact exists with respect to fraud; the record is devoid of any evidence that fraud was perpetrated upon the decedent in the making or execution of the propounded instrument. Accordingly, petitioner's motion for summary judgment is granted regarding fraud.

CONCLUSION

For the above-stated reasons, the motion for summary judgment is granted, and the objections to the probate of the propounded instrument are dismissed.

Settle decree.

Dated: December 8, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court