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

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In the Matter of the Probate Proceeding of the
Last Will and Testament of

File No. 353318

JOHN FARRELL
A/K/A JOHN JOSEPH FARRELL, SR.,

Deceased.

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In this contested probate proceeding, the proponent, Patricia Huff, the daughter of the decedent, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the propounded instrument dated June 25, 2007 to probate. The objectant, John J. Farrell, Jr., who is the son of the decedent, cross-moves for summary judgment denying probate to the propounded will dated June 25, 2007.

FACTUAL BACKGROUND

The decedent, John J. Farrell, Sr., died on August 2, 2008, survived by four children: Kevin M. J. Farrell, John J. Farrell, Jr., Eileen Quesenberry and Patricia Huff. The decedent's wife, Bernandine Farrell, predeceased the decedent, as did his daughter, Colleen. The will offered for probate provides a $25,000.00 bequest to John J. Farrell, Jr.; the remaining amount of a private mortgage held by decedent for property located at 225 Hillside Avenue, Douglaston, New York is to be divided evenly among Patricia Huff, Eileen Quesenberry and Kevin M. J. Farrell and the residuary is to be divided evenly among Patricia Huff, Eileen Quesenberry and Kevin M.J. Farrell. The will nominates Patricia Huff as executor.

OBJECTIONS

The objectant has interposed the following objections to the propounded instrument:

"1. The instrument propounded is not the last will and

testament of the decedent.

2. The instrument is not the last will and testament of the decedent in that the signature affixed thereto, alleged to be the signature of decedent, John Farrell a/k/a John Joseph Farrell, Sr., is not, in fact, decedent's signature.

3. The instrument offered for probate was not duly executed by the decedent in that he did not affix his signature at the end thereof, nor was such signature made by the decedent in the presence of each of the attesting witnesses, or acknowledged by him to have been made, to each of the attesting witnesses, nor did the decedent declare the instrument to be his last will, nor did at least two attesting witnesses each sign their names to said instrument as a witness at the end thereof at the request of the decedent and in his presence.

4. The instrument offered for probate was not duly executed by the decedent in that he did not publish the same as her [sic] will in the presence of the witnesses whose names are subscribed thereto and that the said alleged witnesses did not sign as witnesses in his presence or in the presence of each other.

5. The instrument offered for probate was not freely and voluntarily made by the decedent. Upon information and belief, the instrument, and the signature thereto, was obtained and procured by fraud, duress and/or undue influence practiced upon the decedent by Patricia M. F. Huff, or by other persons acting in concert or privity with Patricia M. F. Huff whose names are presently unknown to respondent.

6. That on the 25th day of June, 2007, the said decedent, John Farrell a/k/a John Joseph Farrell, Sr., was not of sound mind or memory and was not mentally capable of making a will.

7. Said instrument purported to be the last will and testament of the decedent, John Farrell a/k/a John Joseph Farrell, Sr., was revoked, because decedent executed a second original will on the same day he executed the instrument being

> offered in this probate proceeding, and only said instrument has been produced and offered for probate."

MOTION AND CROSS-MOTION

In support of the motion to admit the will to probate, the proponent submits the deposition testimony of Mary Rose Andreiuolo, the attorney-draftsperson, the deposition testimony of Jeffrey Nish and Anthony Andreiuolo (witnesses to the will) and Patricia Huff, the proponent. In opposition and, in support of the cross-motion to deny probate, the objectant submits his own affidavit, the same deposition testimony as proponent, the affidavits of Evelyn Aquila, decedent's sister, Mary Rose Andreiuolo, the attorney-draftsman, annuity records, medical records and various documents. In further support of the motion, the proponent submits the affidavits of Mary Rose Andreiuolo, Joyce Gassner, Louis Luciani (unsigned), Jeffrey Nish, Kevin Farrell and Anthony Andreiuolo. In further support of the cross-motion, the objectant submits the affirmation of counsel as well as affidavits and deposition testimony previously submitted.

Ms. Andreiuolo was a high school classmate of the proponent, and they met at a reunion in March 2007. In June 2007, decedent purportedly contacted Mary Rose Andreiuolo for the purpose of making a will. After discussions by telephone to go over the terms of the will, Ms. Andreiuolo stated that she visited decedent alone at his residence on June 21, 2007. Decedent explained to her why he wanted the will drafted in the manner it was as he stated that he had given monies to John, Jr. over the years. Ms. Andreiuolo stated that on that day, June 21, 2007, she witnessed the decedent sign a health care proxy and a power of attorney.

Ms. Andreiuolo returned to decedent's residence on June 25, 2007, accompanied by her

husband, Jeffrey Nish, and her father, Anthony Andreiuolo. She explained to them their role as witnesses to decedent's will. Both witnesses testified that they engaged in social interaction with the decedent, that decedent was of sound mind, that the attorney-draftsman read the will to the decedent, that the decedent signed the will in their presence and that they then signed the attestation clause and the self-proving affidavit. Both witnesses stated that they visited decedent's residence only once, to wit, on June 25, 2007 and neither witness could offer any explanation as to why their signatures also appear as witnesses to the decedent's healthcare proxy dated June 21, 2007. The health care proxy was not available to the objectant at the time of the witnesses' depositions.

Ms. Andreiuolo testified that on June 25, 2007, she went with the two witnesses to decedent's residence for a will signing. Ms. Andreiuolo stated that the decedent presented his identification to the witnesses, that she read the will to the decedent, that decedent signed the will and then the witnesses signed the attestation clause. At her deposition, Ms. Andreiuolo testified:

> "Q. After you finished your visit in late June, what documents did you keep and what documents did you leave at the apartment?
>
> A. I left him a copy of the will, of his original will. Actually, what I did, I believe he signed it maybe twice because I took one home with me.
>
> Q. So he signed two originals?
>
> A. I believe that is what it was. I took one with me...
>
> Q. So you left one original copy at his apartment?
>
> A. I said, 'Keep it safe.'
>
> Q. And you had an original copy?

A. I believe I also had an original copy. I made like an extra copy which is why I have these copies in my little folder...

Q. Do you know what happened to the other original will?

A. I believe Mr. Mattone has it.

Q. It is always your practice to sign two original wills?

A. Sure, because you have to make copies. If I leave one with a client and I am at where they live-if I was in my own law office, professional law office, I would have a copy machine and make a copy right there and I wouldn't have to have an extra will signed off. Because I am in Dr. John's apartment or John's apartment, there's no copy machine, as far as I knew, so it's better to have an extra one signed off so I can bring that home, preserve the copy, and give it to whomever the attorney is who is going to probate the will.

Q. So you signed two original wills, took one back to your home office and left one with Dr. John?

A. Yes.

Q. Is there any doubt in you mind about that?

A. No. I am pretty sure that is what I did because I know I have copies of it."

In her affidavit in support of the motion for summary judgment, Ms. Andreiuolo stated:

"I believe that the decedent signed his copy of the exact instrument which was executed by him and attested to by the witnesses for his own records; however, I maintained the original last will and testament of John J. Farrell, Sr. which I later hand delivered to the Law Offices of Mattone Mattone Mattone, LLP after the testator's demise pursuant to an appointment arranged by the petitioner's attorney.

In my sworn deposition testimony, I explained this to the objectant's attorney; however, I did not comprehend that the objectant's attorney was referring to the copy of the instrument given to the testator as a second original

will and that he was trying to establish that a second original will had been executed by the testator.

After reviewing the sworn deposition testimony, I realized that the objectant's attorney was trying to establish this fact which is contrary to what occurred and not reflective of what took place and at no time was a second original will executed and attested to which in any way would be a revocation of the last will and testament propounded to this court as the last will and testament of John J. Farrell, Sr. dated June 25, 2007. At no time did I supply the testator with any other instrument than a duplicate copy of the original law will and testament and at no time did the testator revoke the will dated June 25, 2007 presently before this court for probate."

ANALYSIS

SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tending 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 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,* 29 NY2d 557, 562 [1980]). Summary judgment in a contested probate proceeding is appropriate where an objectant 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]). The remedy, however, is inappropriate where there are material issues of act (*Matter of Pollock*, 54 NY2d 1156 [1985]).

TESTAMENTARY CAPACITY

The proponent has the burden of proving testamentary capacity. It is essential that 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 bound (*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 Fiumara*, 47 NY 2d 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 record establishes that at all relevant times, including the time when the will was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a will. Pursuant to their deposition testimony, the attesting witnesses stated that the decedent was of sound mind at the time of the examination of the propounded will. This testimony was

buttressed by the testimony of the attorney-draftsman who met the decedent to discuss the proposed distribution of his estate, including the members of his family.

Based upon the foregoing, the proponent has established prima facie that decedent was of sound mind and memory when he executed the will (EPTL 3-1.1). The record is absent any proof that at the date of the execution of the propounded will, decedent was incapable of handling his own affairs or lacked the requisite capacity to make a will. In particular, neither the documentary evidence submitted by objectant in opposition to the motion, including excerpts from the Congressional Record, newspaper articles and community service award announcement, all dated some 3 to 5 years prior to the execution of the propounded will, nor the affidavit of decedent's sister, Evelyn Aquila, raise an issue as to decedent's testamentary capacity at the time he executed the will in 2007.

Accordingly, on the issue of testamentary capacity, the proponent's motion is granted, and the objection of lack of testimony capacity is dismissed

DUE EXECUTION

The proponent has the burden of proof on the issue of due execution (*Matter of Kumstar*, 66 NY2d 691 [1985]). Due execution requires that the proposed will be signed by the testator, that such signature be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge his signature on the propounded will to each witness, that the testator publish to the attesting witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1). If the will execution is supervised by an attorney, the proponent is entitled to the presumption of due execution (*Matter of Collins*, 60 NY2d 466 [1983]); *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]). Where an attorney states to the attesting witnesses, in the

decedent's presence, that decedent is executing a will, such statement meets the publication requirement (*see Matter of Frank*, 249 AD2d 893 [4th Dept 1998]). If the decedent does not expressly request that a particular witness sign the will, such a request may be inferred from a testator's conduct and from circumstances surrounding execution of the will (*Matter of Buckten*, 178 AD2D 981 [4th Dept 1991], *lv denied* 80 NY2d 752 [1992]). The attestation clause and self-proving affidavits further support proponent's assertion that the propounded will was executed in compliance with statutory formalities (*Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Moskoff*, 41 AD3d 481 [2d Dept 2007]).

Here, the testimony of the two attesting witnesses and the attorney-draftsman prima facie establish due execution of the propounded instrument. The objectant's contention that the health care proxy, dated June 21, 2007, bearing the signatures of the attesting witnesses was either not witnessed on that date or that the witnesses may have witnessed the execution of the health care proxy and not the will, does not raise an issue of fact. Although the attesting witnesses in their affidavits could offer no explanation as to appearance of their signatures on the June 21, 2007 health care document, such failure does not, in the court's view, detract from their testimony as to witnessing the decedent's propounded will dated June 25, 2007. Absent from the record is any proof that the propounded instrument was not executed in conformity with the formal requirements of EPTL 3-2.1 (*see Matter of Weinberg*, 1 AD3d 523 [2d Dept 2003]). Accordingly, the objection of lack of due execution is dismissed.

FRAUD

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false

statements to decedent to induce her to execute a will that disposed of her property in a manner contrary to that in which she would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1993]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). There is no such evidence in this case (*Matter of Philip*, 173 AD2d 543 [2d Dept 1991]). Accordingly, the objection of fraud is dismissed.

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 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 weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed in 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]).

The record is devoid of any evidence supporting the objection of undue influence and accordingly, the objection of undue influence is dismissed.

REVOCATION

It is well settled that where a will is executed in counterpart all counterparts constitute the will and revocation of one is a revocation of all (*Crossman v Crossman*, 95 NY 145 [1884]; *Matter of Betts*, 200 Misc 633 [Sur Ct, Kings County 1951]). The failure to produce the copy of the instrument, last shown to have been the possession of decedent, raises a presumption that he destroyed it with the intent of revoking it (*Matter of Kennedy*, 167 NY 163 [1901]; *Collyer v Collyer*, 110 NY 481 [1888]).

Here, there is an issue of act as to whether decedent executed two original wills as to implicate the doctrine of revocation. While the attorney-draftsman asserts that only one will was fully executed by decedent, and, therefore, no other original exists, the attorney's own deposition testimony, excerpted above, raises an issue in that regard (*cf. Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]).

DISCOVERY

Objectant's assertion that the proponent's motion for summary judgment should be denied as discovery is not complete is without merit. Objectant notes that the proponent has failed to produce the power of attorney that decedent allegedly executed June 21, 2007 and contends that examination of that document is essential. The missing power of attorney, however, does not raise issues of fact as to the execution of the propounded instrument dated June 25, 2007 and, for the same reason that the health care proxy dated June 21, 2007 does not raise issues of fact, neither does the power of attorney. There has been no showing that facts

essential to oppose proponent's motion may exist but cannot now be stated (*Jones v Community Bank of Sullivan County*, 306 AD2d 679 [3d Dept 2003]; *Matter of Dietrich*, 271 AD21 894 [3d Dept 2000]).

CONCLUSION

The proponent's motion for summary judgment is granted to the extent of dismissing the objections of lack of due execution, lack of testamentary capacity, fraud and undue influence and is otherwise denied.

The objectant's cross-motion denying probate to the propounded will is denied as there is an issue of fact as to whether decedent executed two original wills.

This matter will proceed to trial on the issue of revocation on December 13, 2010 through December 16, 2010.

The attorneys are directed to appear for a pre-trial conference on April 28, 2010, at 9:30 a.m.

Settle order on five days notice with five additional days, if service is made by mail.

Dated: March 31, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court