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. 343479/A

LEE T. STRICKLAND
A/K/A LEE THOMAS STRICKLAND,

Dec. No. 26361

Deceased.

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In this contested probate proceeding, the proponent, William Strickland, the brother of the decedent, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the propounded instrument dated October 11, 1967 to probate. The objectant, Madeline Strickland, is the wife of the decedent.

FACTUAL BACKGROUND

The decedent, Lee T. Strickland, died on June 16, 2006, survived by his wife, Madeline, and his brother, William. The will offered for probate provides that the residuary be equally shared by his mother, Harriet, and his brother, William, and if either individual predeceased, his or her share to the surviving beneficiary. Harriet predeceased.

OBJECTIONS

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

"1. That the said instrument offered for probate was not duly executed as required by law; that at the time of the subscription or acknowledgment by the said Lee T. Strickland, if such subscription or acknowledgment was in fact made, the said Lee T. Strickland did not declare to at least two of the attesting witnesses that the said paper offered for probate was his Last Will and Testament; that he did not request that said witnesses to be witnesses thereto; that if the decedent signed the will, he did not do so in the presence of said witnesses nor did he acknowledge to each of them that said subscription appearing on such paper had been made by him.

2. That the decedent did know, understand or was aware of the content, meaning and/or consequences of the paper writing presented to him for execution, if decedent so executed same."

THE MOTION

In support of the motion to admit the will to probate, the proponent submits his own affidavit, the deposition testimony of Marilyn Ackerman, a witness to the will, the SCPA 1406 affidavit of Marilyn Ackerman and the affirmation of counsel. In opposition, the objectant submits her own affidavit, the affirmation of Denis T. McGee, Esq., the same deposition testimony as proponent, a draft of decedent's last will and testament dated June 2006 and the affirmation of counsel. In further support of the motion, the proponent submits the affidavit of Kathleen Strickland, the proponent's wife, and the affirmation of counsel.

There were three witnesses to the propounded will, Loretta Convy, Marvin Peck and Marilyn Ackerman. Loretta Convy and Marvin Peck are deceased. Ms. Ackerman testified that in 1967, she was a co-worker of decedent's mother, Harriet, in the Social Security Administration office in Mineola, New York. Ms. Ackerman stated that she knew decedent by reason of his occasional visits to his mother at the office. They engaged in casual conversations. Ms. Ackerman stated that she, Loretta Convy and Marvin Peck all worked in the same room in close proximity . Ms. Ackerman testified:

A I don't know really. I think Loretta, Marvin and I witnessed the signature of the will. That is all I remember. I don't know anything else.

Q Were you all called in to a certain area?

A We were all sitting in a certain area in the back, I think, if I remember correctly.

Q Was the document handed to you to sign your name by Mr. Peck?

A I don't remember.

Q Did you sign - - did you see Mr. Strickland sign?

A I don't remember. I would say yes.

Q Pardon me?

A I don't remember.

Q Was there any discussion that day by Mr. Peck with Mr. Strickland about Respondent's A marked for identification [the propounded will].

A I don't know.

Q Do you know if when you placed your name on this document, if Mr. Strickland's name was already there?

A I don't remember.

Q Do you know whose handwriting on Respondent's A marked for identification where it says 11th October indicated that the witness is reviewing that document.

A What is he talking about?

Q Respondent's A.

MR. OSHINSKY: Could you reask the question.

BY MR. VISHNICK:

Q Sure. Do you know who wrote 11 and the word October on this?

A No.

Q That is okay. You don't know who wrote that?

A No.

Q Thank you.

Do you know if that was on the document before you signed or you don't know?

A I don't know.

Q On the day that Respondent's A marked for identification was signed by you, did Mr. Strickland ever say anything to you that day?

A No. I don't remember.

Q Did Mr. Peck say anything to you that day with respect to Respondent's A marked for identification?

A No.

Q Did Mr. Peck ever read anything from Respondent's A marked for identification to you?

A No.

Q Did he ever read anything from A to Ms. Convey? (sic)

A I don't know.

Q Do you know if there were other documents also signed that day?

A I don't know.

Q When the document was signed by you, was it already stapled?

A I don't remember.

Q Do you remember if there was a back on it that said anything?

A I don't remember.

Q Okay. Do you know if after you signed - - strike that.

After you signed your name, could you please tell me what, if anything, else occurred?

A Nothing. I remember nothing else.

Q After you signed, did you see anyone else sign?

A I don't remember.

Q After you signed, do you know what happened with Respondent's A, this document?

A No.

Q Did anybody say anything to you that day about this document other than what you told us?

A No.

Q And from the time that you first saw this document until the time that you signed the document, did you have any idea how much time elapsed?

A No.

Q Do you have any idea how much time it took with everyone involved?

A Very little time.

Q Say a minute, two minutes?

A Two minutes.

BY MR. VISHNICK:

Q When you signed Respondent's A for identification, was anybody right near you?

A I don't remember.

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Q Do you know if on October 16, 1967 - - October 11, 1967, if

Mr. Strickland was of sound mind and memory?

A I assume so.

Q But do you know?

A No.

In his affidavit, the proponent avers that upon decedent's passing, he, his wife Kathleen, and decedent's wife Madeline were present in decedent's residence when decedent's safe was opened. The proponent states: "We found, in the safe, the propounded document now being offered for probate among other personal effects."

In her affidavit in opposition, objectant states:

> 3. I have been informed that my brother-in-law, William Strickland, the Petitioner in this action claims that he located a purported last will and testament of my husband from a safe in my house while he was in my presence. After my husband passed away, the petitioner and I retrieved documents from my husband's safe so that we could obtain papers relating to my husband's service in the army that were required for his funeral arrangements. When the documents were retrieved from my husband's safe, my brother-in-law advised me that he located his grandfather's will and his own birth certificate. He asked me if he could have these documents. I told him that he could have his Grandfather's Will and his birth certificate. At no time did the petitioner ever locate or claim to locate any document purporting to be my husband's last will and testament from the safe.
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> 4. The allegation of petitioner that the purported will of the deceased was found in the safe of my husband is totally a fabrication. There is a substantial question at issue as to the location at which the purported document was located and when.

Denis T. McGee, attorney, states that in June 2006, decedent requested that he draft a will

bequeathing all of his property to his wife, Madeline, other than certain items and personalty. Decedent specifically told the attorney that decedent had never executed a will and that decedent wanted to create one for the protection of his wife.

In reply, Kathleen Strickland, proponent's wife, corroborates the proponent's version as to where the propounded instrument was located, that is, from a safe in the decedent's residence.

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]).

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 that the instrument is his will, and that the 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]).

Here, the execution of the propounded instrument was not supervised by an attorney. Moreover, the testimony of the surviving attesting witness, excerpted above, given more than forty (40) years after the execution of the propounded instrument, does not directly support a finding of due execution as she could not recall certain of the elements of due execution (*cf.* EPTL 3-2.1). Under such circumstances, there are issues of fact as to due execution.

ANCIENT DOCUMENT RULE

Alternatively, the proponent asserts that the propounded instrument should be admitted to probate under the ancient document rule of evidence.

"A will may be admitted to probate as an ancient document where it is more than thirty (30) years old, taken from a natural place of custody and is unsuspicious in nature" (*Matter of Gallagher*, 23 Misc 3d 1126A [Sur Ct, Bronx County 2009]; *Matter of Brittain*, 54 Misc 2d 965 [Sur Ct, Queens County 1967]; *Matter of Hehn*, 6 Misc 2d 801 [Sur Ct, Nassau County 1957]). Here, there is a sharp question of fact as to where the propounded instrument was located after decedent's death precluding the application of the ancient document rule.

Accordingly, the proponent's motion for summary judgment dismissing the objections is denied.

The matter is scheduled for a conference on July 20, 2010, at 9:30 a.m.

The above constitutes the order and decision of this court.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court