

Matter of Youngwall
2010 NY Slip Op 31740(U)
June 29, 2010
Sur Ct, Nassau County
Docket Number: 344299
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 Probate Proceeding, Will of

File No. 344299

SHELL B. YOUNGWALL,
 a/k/a SHELL BROR YOUNGWALL,

Dec. No. 26484

Deceased.

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 In this contested probate proceeding, the proponent, Anthony P. Gallo, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the propounded instrument dated March 19, 2003 to probate. The objectant is Nils Youngwall, the son of the decedent. The propounded instrument nominates Anthony P. Gallo as executor.

FACTUAL BACKGROUND

The decedent, Shell B. Youngwall, died on August 8, 2006, at the age of 88, survived by two children: Perry Youngwall and Nils Youngwall. Decedent and his wife of 42 years, Shirley, were divorced on January 8, 2004. The will offered for probate bequeaths substantially all of decedent's assets to Perry to the exclusion of Nils. The decedent had as many as six wills, all but one of which (March 31, 2001) excluded Nils from decedent's estate.

TRANSAERO

In 1954, the decedent founded Transaero, a company in the business of the distribution of airplane parts and accessories. Decedent was the sole shareholder. Both Perry and Nils were employed by the company. In 1995, Nils' employment was terminated and thereafter, he and decedent were estranged. On April 12, 2002, pursuant to a stock purchase agreement, the decedent sold his stock in Transaero to Perry who executed a note for \$9,600,000, representing

the purchase price of 80% of decedent's shares. The remaining 20% of the stock was gifted by decedent to Perry. Prior to the stock sale, decedent transferred substantial assets to Shirley.

THE DIVORCE

The decedent and Shirley were married on October 28, 1961. In 2002, decedent and Shirley each commenced a divorce action. Pursuant to a stipulation of settlement dated August 13, 2003, Shirley and the decedent resolved their differences. A judgment of divorce was entered on January 20, 2004 (Supreme Court, Nassau County, La Marca, J.). During the pendency of the divorce proceedings, the decedent executed the propounded will dated March 19, 2003.

OBJECTIONS

The objectant has interposed the following objections to the propounded instrument: lack of testamentary capacity, lack of due execution, fraud, and undue influence.

THE MOTION

In support of the motion to admit the will to probate, the proponent submits his own affidavit, the deposition testimony of Christine Ardita and Cheri Lewis (witnesses to the will), the affidavits of Vincent Notaroberto, Richard Kane, Charles Kane (employees of Transaero), Thomas Megale, CPA (Transaero's accountant), Shirley Youngwall, Norman Heller, Esq. (Shirley's attorney) and Anthony J. Gallo, Esq., an associate in proponent's law firm. Various documentary evidence was also submitted.

In opposition, the objectant submits his own affidavit, the affirmation of counsel and voluminous documentary evidence including hospital records, a prior will of the decedent dated March 3, 2001, a codicil dated January 19, 2002, and a will dated April 25, 2002, records of litigation involving Transaero, decedent and Perry, correspondence, and documents contained in

the decedent's divorce proceeding.

In further support of the motion, the proponent submits his own affidavit, the reply affirmation of counsel, and decedent's prior wills dated November 2, 1995, April 28, 1999, February 5, 2000.

DISCUSSION

Anthony P. Gallo, an attorney, met the decedent in 2001 and represented the decedent in connection with the sale of Transaero and supervised the closing of that sale. Mr. Gallo also represented the decedent in his divorce action. Mr. Gallo drafted the propounded instrument that is the subject of this proceeding. Mr. Gallo had also drafted decedent's 2002 will. According to Mr. Gallo, during the pendency of decedent's divorce proceeding, the decedent asked him to draft a new will. Decedent met with Mr. Gallo alone in Mr. Gallo's office and stated that as a result of decedent's estrangement with Nils, decedent did not want to leave anything to Nils. In addition, because of the pendency of the divorce proceedings, decedent did not want to leave Shirley anything either. Mr. Gallo stated that he again met with the decedent on the date of the execution of the will to review its terms. An associate in Mr. Gallo's office, Anthony J. Gallo, Esq., assisted in the supervision of the execution of the will. Mr. Gallo, the proponent, stated that he met with the decedent multiple times over the course of 2002-2004 and that decedent was aware of his assets and assuredly competent to execute a will in March of 2003, noting that several months after the execution of the will, decedent entered into a stipulation settling his divorce proceeding. Shirley and her attorney, Norman Heller, concurred as to the decedent's competency.

Christine Ardita and Cheri Lewis, two of the three attesting witnesses, former employees

in the office of Anthony P. Gallo, acted as witnesses to the will. The decedent was well known to both witnesses. The decedent was asked whether he wanted these individuals to witness his will and decedent responded in the affirmative. The witnesses were then asked to sign their names. The witnesses executed self-executing affidavits as well. Anthony J. Gallo, Esq., averred that he observed the statutory formalities in the execution of the propounded instrument.

Vincent Notaroberto, Richard Kane and Charles Kane, three long-time employees of Transaero, as well as Thomas Megale, Transaero's accountant all related, in effect, that decedent was competent to manage his own affairs in March of 2003.

Nils stated that he visited his parents on a regular basis from early 1998 until April 12, 2002, the date on which Shell began residing with Perry. Concerning his employment tenure at Transaero, Nils averred that his position as Vice President in charge of administration was often the source of enmity among Transaero employees as he was required to act as the company's "heavy." An unsigned letter of a physician dated March 5, 2002 was offered to establish decedent's inability to understand complex directions and that his loss of memory was getting progressively worse.

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 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 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 execution of the propounded will. This testimony was buttressed by the testimony of the attorney-draftsman who was well familiar with the decedent and met the decedent to discuss the proposed distribution of his estate, as well as the attorney who assisted in the will’s execution. The affidavits of Vincent Notaroberto, Charles Kane, Richard Kane and Thomas Megale also support decedent’s competency at the time he executed the will.

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 devoid any proof that at the date of the execution of the propounded instrument, decedent was incapable of handling his own affairs or lacked the requisite capacity to make a will. In particular, the 2001 North Shore University Hospital records do not raise an issue as to decedent’s testamentary capacity at the time he executed the will in 2003. The unsigned correspondence of Dr. Slanetz dated March 5, 2002 submitted by objectant in opposition has not been considered by this court as it is not in admissible form.

Accordingly, the objection of lack of testamentary 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 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]). 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, the attorney-draftsman and the attorney who assisted in the supervision of the will prima facie establish due execution of the propounded instrument. 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 him to execute a will that disposed of his property in a manner contrary to that in which he 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 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 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 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]).

The record is devoid of any evidence supporting the objection of undue influence. The submission of multiple litigations (Affirmation in Opposition, Exhibits [G-Q]) involving corporate entities, decedent, Perry, and Shirley have no bearing on the validity of the propounded instrument dated March 19, 2003. Nor does the April 2002 sale of Transaero to Perry at allegedly below market value bear on the validity of the propounded will. It should be emphasized that the propounded will was executed in March 2003 during the pendency of decedent's divorce proceedings that culminated in a judgment of divorce in January 2004. The stipulation of settlement in the divorce action in August 2003, some five (5) months after the execution of the will encompassed the transfer of substantial assets. Contrary to objectant's assertion, the fact commencing in April 2002, by reason of the pendency of the divorce proceeding, the decedent resided with Perry is not evidence of undue influence (*cf. Matter of Delyanis*, 252 AD2d 585 [2d Dept 1998]). Indeed, the evidence on this issue shows that decedent voluntarily took up residence with Perry. "An inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference" (*Matter of Ruef*, 180 App Div 203, 204 [2d Dept 1917], *affd* 223 NY 582 [1918]).

In this regard, the court notes that the propounded instrument is consistent with decedent's overall testamentary plan, that is, the exclusion of Nils from decedent's estate. There is no evidence that Perry actually exercised any undue influence upon the decedent (*cf. Matter of Walther*, 6 NY2d 49 [1959]).

Accordingly, the objection of undue influence is dismissed.

The proponent's request for an award of costs pursuant to CPLR 2302 and sanctions is denied.

Proponent's motion is granted; the objections to the March 19, 2003 will are dismissed. A decree may be entered admitting the propounded instrument to probate.

Settle decree.

Dated: June 29, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court