Matter of Penzes

2010 NY Slip Op 31753(U)

June 3, 2010

Sur Ct, Nassau County

Docket Number: 354748

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

GEORGE J. PENZES,

Deceased.

File No. 354748

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In this contested probate proceeding, the proponent, Christine L. Reid, the granddaughter of the decedent, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the propounded instrument dated March 5, 2008 to probate.

FACTUAL BACKGROUND

The decedent, George J. Penzes, died on January 21, 2009, survived by three children: Kenneth Penzes, Robert Penzes and Louise Gulotta. The decedent's son, Lawrence, predeceased. The will offered for probate provides that the residue be left to Louise outright and that if she predeceased, to the proponent, Christine, Louise's daughter.

The will nominates Christine as executor. In two prior wills dated July 25, 1997 and January 3, 2006, the decedent provided Louise with a life estate in decedent's residence and a supplemental needs trust, respectively. In each instrument Kenneth and Robert received a share of the residuary.

OBJECTIONS

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

THE MOTION

In support of the motion to admit the will to probate, the proponent submits the affirmation of counsel, the deposition testimony of Joseph Meares, the attorney-draftsman, the deposition testimony of Virginia Alese and Ann Corette, witnesses to the will, the preliminary conference order dated August 5, 2009, decedent's prior will dated January 3, 2006, various correspondence and decedent's handwritten note dated February 27, 2008. In opposition, the objectant submits his own affidavit, the affirmation of counsel and decedent's two prior wills, January 3, 2006 and July 25, 1997. In further support of the motion, the proponent submits the affirmation of counsel, certain medical records, various correspondence and the affirmation of counsel referable to correspondence to objectant's counsel.

Joseph Meares, the attorney-draftsman, stated that the decedent himself arranged the February 15, 2008 meeting to discuss changes to decedent's prior will (also drafted by Mr. Meares). The decedent discussed his desire to protect his daughter, Louise, and wanted to be sure she was provided for as well as reconsider the nomination of his sons as executors. Decedent's desire to protect Louise was revisited at a February 19, 2008 meeting with Mr. Meares as well as in a subsequent telephone conversation. The attorney-draftsman sent a draft of the will to decedent on March 3, 2008 and on March 5, 2008, decedent came to the attorney's office for the purposes of executing a will. The decedent gave to the attorney a handwritten note dated February 27, 2008 written prior to coming to the office, to his sons which he wanted the attorney to read. The note, which had already been written and was not written pursuant to the attorney's instructions, stated:

"Dear Kenneth & Bob,

I want to tell you a few words of appreciation for all the things you did for me. I want to thank you all good sons to me. Thank you for taking me to the doctor's. Thank you for the food I ate, thank you Tommy & Josie. I want you to know that I left everything to Louise because she needed my help and I wanted to help her I hope you understand that and respect my wishes. I bless you all I pray that God will lead you to a holy life never turn away from God, be honest with each other I send you my love. Your Dad. George Penzes."

Two employees of the attorney, Virginia Alese and Ann Corette, witnesses to approximately 200 and 40-50 wills respectively, witnessed the decedent sign the propounded instrument and declare it to be his will under the supervision of the attorney-draftsman. The witnesses testified that at decedent's request, they each signed the attestation clause. Based on their observations of the decedent's conduct at the time of the will execution, each believed that decedent had the necessary capacity to execute a will and was free of any undue influence. The witnesses executed an affidavit pursuant to SCPA 1406.

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, 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 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 fact (*Matter of Pollack*, 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 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 record establishes that at 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 met the decedent to discuss the propounded distribution of his estate.

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, objectant submitted no relevant medical evidence to support his assertion that decedent's medications affected his mental capacity or that decedent was unable to communicate with the attorney-draftsman.

Accordingly, on the issue of testamentary capacity, the proponent's motion is granted, and 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]). The elements of due execution are that the testator's signature should be at the end of the will, that such signature shall be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge to each witness that the signature affixed on the instrument was affixed by her, that the testator publish to the attesting witnesses that the instrument is her will and that at least two attesting witnesses witness the testator's signature and sign their names (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 contentions that the will was not read in its entirety to the decedent at the time of the execution and that the will apparently was not stapled at the time the decedent executed it do not raise an issue of fact; nor does the use of decedent's middle initial create an issue of fact. 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 exercise 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 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 Dept 1999]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]).

The record is devoid of any evidence supporting the objection of undue influence. Indeed, the evidence is to the contrary, that is, that the decedent wanted to protect his daughter, Louise, and that the decedent wanted her to be able to control the assets after his death. Moreover, as the objectant asserts he was the decedent's primary caregiver, it cannot be argued he was denied access to the testator. The fact that objectant and his brother, Robert, were not left anything under the propounded will does not, without more, raise an issue of fact as to undue influence.

Accordingly, the objection of undue influence is dismissed.

DISCOVERY

Objectant's assertion that the proponent's motion for summary judgment should be denied as discovery is not complete is without merit. Pursuant to the court's preliminary conference order dated August 5, 2009, discovery was to be completed by December 30, 2009. The record demonstrates that discovery was not scheduled in a timely fashion. Further, there has been no showing that further discovery might reveal the existence of material facts which would warrant the denial of summary judgment (*see* CPLR 3212 [f]; *M&T Mortg Corp v Ethridge*, 300 AD2d 286 [2d Dept 2002]; *cf. Bank of Sullivan County,* 306 AD2d 679 [3d Dept 2003]).

CONCLUSION

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

Settle decree on five days' notice with five additional days if service is made by mail.

Dated: June 3, 2010

JOHN. B RIORDAN
Judge of the
Surrogate's Court