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

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Probate Proceeding, Will of

NICOLINA D. HAYHURST, File No. 355546

Deceased.

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In this contested probate proceeding, petitioner Natasha Grove Spivey moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the objections filed by objectant *pro se*, Katherine D'Alessandro. Katherine opposes the motion.

BACKGROUND

The decedent, Nicolina D. Hayhurst, died on January 10, 2009, at the age of 91. Her husband died in 1962. The decedent did not have any children. She was survived by five nieces and nephews, who are the children of the decedent's two predeceased brothers, Gaspar D'Alessandro and Alexander J. D'Alessandro. Frank D'Alessandro and Petrina Vanacek are Gaspar's children. Jody Grove, Frank D'Alessandro and Katherine are the children of Alexander. The decedent left no other distributees.

Natasha has offered for probate a document dated January 12, 2006 as the decedent's last will and testament. Frank, Petrina, Jody and Frank have filed waivers and consents to the probate of the propounded instrument. Preliminary letters testamentary were issued to Natasha on April 7, 2009.

The witnesses to the propounded instrument, Karen Muller and Charles E. Lapp, III, were examined pursuant to SCPA 1404. Mr. Lapp is also the attorney-draftsman of the instrument. On August 24, 2009, Katherine filed objections to probate and a demand for a jury trial. On

February 3, 2010, Katherine and Mr. Lapp appeared at the call of calendar; they both stated that the matter was ready for trial and a jury trial was scheduled for May 24-28, 2010.

The propounded instrument provides for the appointment of the decedent's grandniece, Natasha Grove Spivey, as executrix. Article SECOND of the will contains the only dispositive provisions. It provides as follows:

> "A) Fifty percent (50%) of my residuary estate to my greatniece, NATASHA GROVE SPIVEY, the daughter of my niece, JODY GROVE; if my greatniece shall predecease me, then to her issue in equal shares per stirpes.
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> B) Ten thousand and 00/100 dollars ($10,000.00) to ANGELICA RODRIGUEZ, the daughter of my greatniece, CHRISTINA FELICIA RODRIGUEZ, the daughter of my niece, KATHERINE D'ALESSANDRO.
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> C) The balance of my residuary estate to my greatniece, CHRISTINA FELICIA RODRIGUEZ, the daughter of my niece, KATHERINE D'ALESSANDRO; if my greatniece shall predecease me, then to her issue in equal shares per stirpes.
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> I make no provision in this my Last will and Testament for any other family member for reasons best known to me."

According to the petition for probate and letters testamentary, the decedent's estate consists of real property valued at $550,000 and $5,000 in personal property.

Katherine's objections to the probate of the propounded instrument read as follows:

> "1. Natasha Spivey is the greatniece of both Angela Labita and Nicolina Hayhurst[.] She is a Jehovah Witness as her mother Jody Grove.
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> 2. She is mentally incompetent. She is very greedy and disrespectful to my Dad and me and never was in touch with my Dad only for money. After she threatened him and me stating Unless we became Jehovah Witnesses she will never visit or Respect us as she did.

> 3. When my father became deceased she wanted to know how much money she could acquire from him and contacted me by phone when I objected she threatened me on the phone.
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> 4. She has made it also her personal business to always be around Nicolina Hayhurst as a few times I went to visit Nicolina Hayhurst She did not want me to see her and told her to call Police on me. She was also there the day she put her in the hospital.
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> 5. She obviously has no respect for family members. My father supported his two sisters before they moved to Rockaway Turnpike and because of his financial support they were able to buy the house at 23 Rockaway Turnpike, Lawrence, New York. My Dad or myself are not mentioned at all in the will[.] [T]his is very unfair and I should have my rightful share to the will.
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> Therefore I will also ask for demand for trial by jury as I have spoken to many attorneys since that day and they have indicated due to all factors they reviewed that a trial by jury would be most fair. Please also therefore do not allow Natasha Spivey to be the executor of the will of Nicolina Hayhurst as she has made sure it is distributed in her favor."

Although Katherine's objections are not stated as such, the court will treat them as though they allege lack of testamentary capacity, lack of due execution, fraud, undue influence and a request for the imposition of a constructive trust.

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]).

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]).

Mr. Lapp testified at his SCPA 1404 examination that he met with the decedent in November 2005 to discuss the decedent's instructions about preparing a will for her. In an affidavit in support of his client's motion for summary judgment, Mr. Lapp states that he was contacted by Natasha, who had obtained his name from the Nassau County Bar Association Referral Service. Natasha told him that the decedent wanted to make a will, that she had limited eyesight and that her sister, Angela Labita, had recently died. Mr. Lapp made an appointment to visit the decedent at her home in Lawrence, New York, where he met on November 4, 2005 with the decedent and Natasha. The decedent told Mr. Lapp that she wanted her assets to go to two of her grandnieces, Christina Rodriguez and Natasha. Mr. Lapp states that the decedent told him that Natasha had been of great assistance to her and to Angela. At the meeting, the decedent supplied Mr. Lapp with her personal and familial information, her income and her assets.

Mr. Lapp testified at the SCPA 1404 examination that he prepared the will in accordance with the decedent's instructions and mailed a draft to the decedent's home. The will execution ceremony took place on January 12, 2006 at the decedent's home. According to Mr. Lapp, only he, his secretary, Karen, and the decedent were present. Mr. Lapp's presence at the execution ceremony 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]). The attestation clause is signed by two witnesses, which is prima facie evidence of due execution (3 Warren's Heaton, Surrogate's Court Practice § 42.05 [4] [7th ed 2006]).

In the course of the ceremony, the decedent, Mr. Lapp and Karen were talking. Mr. Lapp testified that Karen mentioned to the decedent that, although they had spoken on the telephone in the past, they had not met until then. They also spoke about some other documents that Mr. Lapp had prepared for the decedent. Karen was present for the entire time. Mr. Lapp told the decedent that he had the will with him and asked her if she wanted to sign it. The decedent stated that she did. Since the decedent had limited vision, Mr. Lapp read the contents of the instrument to the decedent in Karen's presence. Mr. Lapp testified that the decedent was "clear, lucid, [and] understood what she was about to do." Mr. Lapp testified that the decedent did not appear to be acting under duress in signing the instrument. Mr. Lapp asked the decedent if this is the will she wanted to sign, and she answered that it was. Mr. Lapp then stapled the instrument and showed the decedent where to sign it. Mr. Lapp observed the decedent sign the will. Then, while they were all still together at the decedent's home, Mr. Lapp and Karen signed the attestation clause. They later signed the affidavit of subscribing witnesses in front of a notary in her office.

Karen was also examined pursuant to SCPA 1404. Her testimony confirms that of Mr.

Lapp. Karen testified that she silently read a copy of the will while Mr. Lapp was reading aloud the original to the decedent. Karen also testified that Mr. Lapp asked the decedent whether she declared the document to be her will and whether she requested that Karen and Mr. Lapp act as the witnesses, to which the decedent answered in the affirmative. Karen testified that she observed the decedent to be as "sharp as a tack." The decedent stated that she understood the contents of the will and that she wanted it to be her will. Karen stated that she watched the decedent sign the instrument and then Mr. Lapp and Karen signed the attestation clause in the decedent's presence. Karen and Mr. Lapp signed the affidavit of subscribing witnesses later that day in the office of the notary.

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 Natasha 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 exist, Natasha'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 objects 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 the SCPA 1404 examination, Mr. Lapp and Karen each testified that the decedent appeared lucid on the date she executed the will. Mr. Lapp and Karen both signed an affidavit attesting witness in which they swore that the decedent was not suffering from any "defect of sight, hearing or speech, or from any other physical or mental impairment mind and memory on the date she executed the will, except that the Testatrix stated that she had limited vision and requested that the WILL be read aloud before the WILL signing, all in our presence."

Based upon the record, the court finds that Natasha has met her burden of proving that the decedent possessed testamentary capacity on the date she executed her will. Katherine did not see the decedent on the date she signed the propounded instrument. In fact, Katherine admits that she had not visited the decedent since 1974, although she claims to have spoken to her by telephone, when the decedent would tell Katherine that she could not hear her.[1] In the papers she submitted in opposition to the motion, Katherine states that the decedent's "hearing was impaired and her mental capacity was also impaired during the course of her years living with my Dad and me and thereafter as she would not executed a will of this nature." Thus, although Katherine

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[1]Katherine also had some contact with the decedent in the course of another probate proceeding in this court where the decedent was the fiduciary and Katherine was the sole objectant. Mr. Lapp represented the decedent in that proceeding. The propounded will was admitted to probate in October 2008.

alleges that the decedent was mentally incapacitated, she has not introduced any evidence that creates a triable issue of fact. Accordingly, Natasha'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]).

Katherine states that Natasha became closer with the decedent toward the end of her life because Natasha wanted the decedent's money. Katherine also states, "As far as I know [the decedent] suffered no illness. I do believe that Natasha Spivey deliberately took her to the hospital where she was put to death like most seniors." Katherine's bald assertions are insufficient to create a triable question of fact with respect to undue influence. Indeed, there is absolutely no evidence in the record that anyone unduly influenced the decedent to make or execute the propounded will. Accordingly, Natasha'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]). 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]).

Katherine does not allege that Natasha, or anyone else for that matter, made a false statement to the decedent that induced her to make the propounded will. Katherine 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, Natasha's motion for summary judgment is granted regarding fraud.

CONSTRUCTIVE TRUST

Katherine's objections appear to allege that the decedent and Angela Labita, who were Katherine's father's sisters, had promised Katherine's father (who predeceased both Angela and the decedent) that he would receive the real property located at 23 Rockaway Turnpike, Lawrence, New York, and that they owed him money because he allegedly provided financial support to his sisters during his lifetime. The Lawrence property is an asset of the decedent's estate. If Katherine's objections are construed as a request for the imposition of a constructive trust, they fail as a matter of law.

"It is well established in New York that a person who has not obtained letters as personal representative lacks standing or the legal capacity to commence an action on behalf of an estate " (*Schoeps v Andrew Lloyd Webber Art Found.*, 17 Misc 3d 1128[A], *2 [Sup Ct, New York County2007], citing EPTL § 11-3.2; *Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 34 [1st Dept 2006]). There is no evidence in the record that Katherine was appointed as personal representative of her father's estate. Thus, Katherine lacks standing to advance a request for the imposition of a constructive trust on behalf of her deceased father.

Although the following criteria are not rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]) and "a constructive trust may be erected whenever necessary to satisfy the demands of justice" (*Latham v Father Divine*, 299 NY 22, 27 [1949]), there is no evidence in the record of the usual elements required for the imposition of a constructive trust, which are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Losner v Cashline, L.P.*, 41 AD3d 789, 790 [2d Dept 2007]). There is no evidence that the decedent was in a fiduciary or confidential relationship with Katherine's father. There is also no evidence, other than

Katherine's bald assertion, that the decedent, or anyone else for that matter, promised Katherine's father her interest in the house. There also is no evidence that Katherine's father made a transfer in reliance upon the decedent's alleged promise to give the real property to him. And, finally, there is no evidence that the decedent was unjustly enriched. Thus, even if Katherine had standing, the evidence before the court fails to establish the existence of a triable issue of fact that would require a trial on the issue of whether a constructive trust should be imposed on the real property (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Katherine's objections are dismissed to the extent they attempt to allege that issue.

CONCLUSION

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

Settle decree.

Dated: May 17, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court