

<b>Matter of Wilkinson</b>
2010 NY Slip Op 33075(U)
September 30, 2010
Surrogate's Court, Nassau County
Docket Number: 355006
Judge: John B. Riordan
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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. 355006

KENNETH WILKINSON  
a/k/a KENNETH JAMES WILKINSON,

Dec. No. 26633

Deceased.  
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Before the court is a motion for summary judgment filed by Kerri Consi, a daughter of decedent Kenneth Wilkinson and the objectant to the petition for probate. The probate petition was brought by Barbara Stone, the sister of decedent and the nominated executor under his last will and testament. Preliminary letters issued to Stone by order of this court dated February 25, 2009, and were most recently extended on August 19, 2010.

For the reasons set forth below, the motion is denied, and summary judgment is granted to Stone on the issue of due execution.

Background

Decedent died on February 3, 2009, survived by four children, *viz.*, his three sons, Kevin Wilkinson, Stephen Wilkinson and Jeffrey Wilkinson, and his daughter, Kerri Consi, the objectant and movant herein. The last will and testament of decedent which was offered for probate bears the date November 8, 2007. In his will, decedent directed that his entire estate be distributed to his sister, Stone. The document reflects that the attesting witnesses were (1) George R. Caso, II, who was also the draftsperson of the will and who represented the decedent in his divorce proceeding, and (2) Barbara Deters Kern, who served then and now as Caso's legal assistant.

### Consi's Objections to the Will

On December 28, 2009 Consi filed multiple objections to the will, focusing primarily on an alleged lack of due execution. Consi's counsel examined the two attesting witnesses on December 17, 2009.

### Consi's Motion for Summary Judgment

The present motion for summary judgment upon objections to probate and dismissal of the proceeding followed a lengthy delay in which a settlement was reached concerning payment of decedent's non-probate death benefits, but no settlement was reached in connection with the distribution of decedent's probate property, despite extensive efforts. In her affidavit annexed to the motion, Consi alleges that Stone "cannot appropriately demonstrate due execution of the purported last will and testament" (Affidavit of Consi, Paragraph 3). In support of this statement, Consi offers the following:

A. One witness cannot recall the will signing ceremony.

In Paragraph 8 of her affidavit, movant notes that while Caso testified to his actual recollection of the will ceremony, Kern, despite her memory of decedent, did not testify based upon her recall of the specific execution but relied instead on her personal knowledge of the usual office practice, her recognition of the signatures, and her execution of a self-proving affidavit.

B. The self-proving affidavit was improperly notarized.

Consi notes that Caso testified that his usual practice was to have his secretary or Kern take the executed self-proving affidavit down the hall to another attorney's office, where Joan

McDermott, a notary public who was familiar with their individual signatures, would notarize the affidavit, after which the executed will would be returned to the office and given to the client (Deposition of Caso 13:16:02-16). It is McDermott's notarization which appears on the self-proving affidavit attached to the propounded will. Consi asserts that the practice of sending a self-proving affidavit with two signatures down the hall to another law firm, accompanied by one affiant or a secretary, where the two signatures on the affidavit were to be notarized, is improper. Accordingly, she argues, the self-proving affidavit affixed to the propounded will "could not substitute for an actual or refreshed recollection of due execution of a purported testamentary instrument" (Affidavit of Consi, paragraph 14 [emphasis in original]). Consi argues that the invalidation of the self-proving affidavit due to alleged notary misconduct, when combined with the inability of Kern to recall the will execution, leaves Caso as the sole witness to the will. On this basis, Consi asserts that the court should refuse to admit the propounded will to probate.

C. The testator failed to initial each page of his will.

Consi references Kern's testimony that it was Caso's usual practice to have the testator initial each page of his will (Deposition of Kern 12:53:30-50), and that decedent's will is only initialed on the first page, without explanation for this departure from usual office practice.

D. The proponent's counsel did not produce her for examination.

Consi also claims that Caso refused to produce the proponent, Stone, for examination, and that Stone has made admissions to decedent's children which raised the possibility of another will having been executed by the decedent.

### Summary Judgment

Summary judgment is a drastic remedy (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), awarded only sparingly (*Ronder & Ronder, P.C. v Nationwide Abstract Corp.*, 99 AD2d 608 [3d Dept 1984]), and only when there are clearly no triable issues of fact presented (*NBT Bancorp. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 625 [1996]). In a proper case, however, the court's granting of a summary judgment motion is not only appropriate, but denial of such a motion is reversible error, even in a probate proceeding (*Matter of Greenspan*, 43 AD2d 998 [3d Dept 1974], *affd* 36 NY2d 737 [1975]). To prevail on a motion for summary judgment, the movant must establish his or her right to a directed verdict as a matter of law (*Friends of Animals v Assoc. Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067 [1979]). If the movant meets this threshold, the burden then shifts to the party moved against to lay bare his or her proof in opposition in evidentiary form (*Matter of Bank of New York*, 43 AD2d 105, 107 [1st Dept 1973], *affd* 35 NY2d 512 [1974]). The party moved against may not successfully rely merely on conjecture or surmise (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]); a mere hope that somehow or other the objectant will be able to substantiate his or her allegations at trial is insufficient to deny summary judgment to a proponent who has made out a *prima facie* case (*Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33 [1st Dept 1999]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [2d Dept 1987]).

### Issues Raised in Consi's Motion for Summary Judgment

The motion for summary judgment presently before the court raises the following issues:

1. Is the self-proving affidavit affixed to decedent's will a nullity for failure of the affirming

witnesses to personally appear and swear before the notary public?

2. If the affidavit is a nullity, but the will need not be denied probate for lack of a valid self-proving affidavit, must the will then be denied probate on the ground that only one of the two attesting witnesses has an actual recollection of the will ceremony?

3. Can summary judgment be granted, or this matter proceed to trial, on the basis of either of the other assertions made by movant:

- a. The testator only initialed the first page of the will.
- b. Caso failed to produce the proponent for examination.

#### Analysis

In connection with the motion for summary judgment, the court's analysis of and determination as to each of the above issues is as follows:

1. Is this self-proving affidavit a nullity?

SCPA 1406 provides that a witness to a will execution may "make an affidavit before any officer authorized to administer oaths stating such facts as would, if uncontradicted establish the genuineness of the will, the validity of its execution . . . ." (SCPA 1406 [1] [emphasis added]).

The officer authorized to administer oaths, typically a notary public, certifies that the subscriber appeared before her and swore to the truth of the contents by affixing a clause called a jurat, which is "generally defined as a certificate added to an affidavit stating when, before whom, and where it was made" (Am Jur, Affidavits § 10). The jurat on the self-proving affidavit affixed to decedent's will states: "Severally subscribed and sworn to before me this 8th day of November, 2007." The signature of the notary public follows, along with her notary stamp. However, Caso

testified that his office procedure was that he and Kern “would sign the affidavit of attesting witness and then either Barbara [Kern], or usually my secretary would take it down the hall to Joan McDermott, who was familiar with my signature as well as Barbara’s signature. And that was our procedure.” (Deposition of Caso 13:16:02-16) He further testified that he has no reason to believe that there was anything done in this case which varied from his usual procedure (Deposition of Caso 13:16:37-43). In his affirmation in opposition to summary judgment, Caso again describes his practice as follows:

“I would take the Affidavit of Witness down the hallway to Joann McDermott and ask her if she could notarize my signature. Even though she did not physically witness me sign the document, I informed her that it was my signature and, having seen it so many times before, and having me inform her that it was indeed my signature, she would then notarize it . . . Since I identified it as being my signature, she would sign it based on that representation”

(Caso’s Affirmation in Opposition to Summary Judgment, Paragraph 19).

“An out-of-court affidavit may be used to prove a will if it meets statutory requirements” (1 Harris 5th N.Y. Estates: Probate Admin. & Litigation § 6:124). “A will is presumed to have been properly executed where the will is accompanied by a self-executing affidavit of the attesting witnesses” (*Matter of Carver*, 17 Misc 3d 1128(A) [Sur Ct, Essex County 2007] [internal citations omitted]). In the present case, the testimony of Caso as an attesting witness and as the supervising attorney, and of Kern as an attesting witness, establishes that the statutory requirements of the self-proving affidavit were not met in that the affidavit was not made or sworn to by both affiants before the notary public. This is in contradiction to the statement contained in the jurat on the affidavit. Accordingly, the court is in accord with the first of movant’s assertions, namely, that the self-proving affidavit affixed to decedent’s will is a nullity

for lack of statutory compliance.

2. Without the self-proving affidavit, should decedent's will be denied probate?

According to SCPA 1406, a self-proving affidavit may serve as evidentiary proof of a will's genuineness, the validity of its execution, the competency of the testator to make a will and that the testator was not under restraint. By definition, however, it is not an integral part of a will. In any event, a self-proving affidavit will not be accepted by the court if a party with standing raises an objection or if for any other reason the court determines that the witnesses to the will should be examined (SCPA 1406).

Consi notes that Kern has no actual recollection of decedent's will ceremony, and asserts that the will cannot be admitted to probate on the basis of Caso's testimony alone. Where a witness to a will no longer remembers the will execution, but at least one other witness to the will has been examined and remembers the occurrence, the court may admit the will to probate on the testimony of the witness who does remember the will signing ceremony and "such other facts as would be sufficient to prove the will" (SCPA 1405 [3]). In fact, "[a] will may be admitted to probate notwithstanding the failed or imperfect memory of both attesting witnesses" (*Matter of Collins*, 60 NY2d 466, 468 [1983]). "Memories fade over time and witnesses become unavailable. However, a will may be admitted to probate even if both attesting witnesses cannot recall the will execution. Sufficient 'other facts' may be presented to convince the court that the statute has been satisfied" (*Matter of Miele*, NYLJ, Aug. 28, 1997, at 26, col 4 [Sur Ct, Westchester County], citing EPTL 3-2.1; *Matter of Gagliardi*, 55 NY2d 109 [1982]; *Matter of Collins*, 60 NY2d 466 [1983]).

While Kern did not specifically recall decedent's execution of his will, both Caso and Kern were personally familiar with the testator in connection with his representation by Caso's firm in testator's divorce proceeding. Caso and Kern were also able to independently identify the signatures on the will. Both testified to the usual procedures of Caso's law office in connection with the execution of wills by testators, which appear to have been proper except as to the office practice in connection with the notarization of self-proving affidavits, as discussed above.

Where a will includes a valid attestation clause, it provides prima facie evidence that the will was executed properly (3 Warren's Heaton on Surrogates' Courts § 42.05 [4]). Where the execution of a will is supervised by counsel, there is a presumption of due execution in accordance with New York law (*Matter of Possenriede*, NYLJ, Feb. 26, 2003, at 26, col 2 [Sur Ct, Nassau County]; *Matter of Lichtenberg*, NYLJ, Mar. 21, 2001, at 20, col 5 [Sur Ct, Kings County 2001]). The court finds that all of these elements, combined with Caso's testimony of his recollection of the will signing ceremony and Kern's convincing testimony concerning usual office practice, are sufficient to establish that the will was executed in conformance with the law (*see Matter of Malan*, 56 AD3d 479, 479 [2d Dept 2008] [internal citation omitted]). In order to rebut this presumption and raise a material issue of fact, Consi would have had to offer evidence in admissible form, not hearsay, speculation and conclusory allegations (*Matter of Halpern*, 76 AD3d 429 [1st Dept 2010]; *Matter of Levenson*, 289 AD2d 577 [2nd Dept 2001]). Consi has failed to do so. There being no issue of fact concerning due execution, summary judgment is granted to Stone on this issue, pursuant to CPLR 3212 (b).

3. Can summary judgment be granted, or can this matter proceed to trial, based upon:

a. Testator's failure to initial each page of the will?

Consi is correct in noting Kern's testimony that Caso's usual office practice was to have a testator initial every page of his will, and she is also correct in noting that decedent only initialed the first page of his will. What Consi failed to acknowledge in her papers is that aside from the signature page, which contains the decedent's full signature, the will contained only one page.

b. The failure of Stone's attorney to produce her for examination.

Consi claims that Stone's statements to decedent's children raise the possibility of other wills, and that her attorney should have produced her to be examined by movant's counsel. A review of Stone's statements as cited by Consi and the affirmation submitted by Caso do not support a fact-based allegation that decedent executed other wills.

Caso maintains that the examination of Stone is not allowed unless there is an in terrorem clause, in accordance with the 1993 amendment to SCPA 1404 (4), which added the following language, underlined here for emphasis: "Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents."

Caso is correct in asserting that Consi is not entitled to conduct an examination of Stone pursuant to SCPA 1404. A failure to produce Stone for examination does not impact on the issue of due execution presently before this court. At the same time, Consi is entitled to depose Stone

concerning the question raised with regard to possible superseding wills.

Conclusion

Consi's motion for summary judgment is denied. Summary judgment is granted to the proponent of the will on the issue of due execution as there are no triable issues of fact. The parties are directed to promptly schedule an examination of Stone. The court will not enter a decree admitting the propounded will to probate until after the proponent has been deposed as to whether she has any knowledge of later wills. After the proponent has been examined, Caso may settle a decree admitting the instrument dated November 8, 2007 to probate, unless testimony reveals a subsequent will.

This is the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court