

Matter of Balsamo

2010 NY Slip Op 34134(U)

June 15, 2010

Surrogate's Court, New York County

Docket Number: File No. 0599-2007

Judge: Kristin Booth Glen

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STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF NEW YORK

New York County Surrogate's Court
DATA ENTRY DEPT.
Date: 06-15-2010

JUN 16 2010

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Probate Proceeding, Will of

RALPH BALSAMO,

File No. 0599-2007

Deceased.

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G L E N, S.

Betty Jean Marolla has propounded a will executed on September 3, 2003 by Ralph Balsamo, who died on January 30, 2006, at the age of 59, leaving a probate estate valued at approximately \$150,000. Objections to probate have been filed by decedent's sister, Lorraine Frank, who is one of his two distributees. The objections allege lack of testamentary capacity and the exercise of undue influence by proponent, with whom decedent had resided during the last 15 years of his life. Proponent has moved for summary judgment.

It is undisputed that decedent, an accountant by profession, had become mentally impaired during the early 1990's as the result of several mountain-climbing and hiking accidents. The most serious of the accidents, occurring in 1994 and involving his fall from a bicycle while wearing no helmet, left him with signs of brain injury and associated physical ailments. Within a few months, however, it appears that his doctors had concluded that he had substantially recovered, and he returned to full-time work. Nevertheless, symptoms of brain damage resurfaced in 2000 and they were serious enough to force him into retirement from his accounting job within a year or two. Accordingly, he applied, and qualified, for disability insurance, which he continued to receive until his death about four years later.

Several months prior to execution of the propounded will, attorney Karen Mancuso had drafted an instrument leaving all of decedent's assets to proponent based upon instructions that decedent had given to another attorney at her firm. After Ms. Mancuso sent the draft to decedent

for review, she received a call from proponent, who reported that decedent wanted to change the draft by including a bequest of a watch and clothing to his brother, Raymond, and a contingency provision under which Lorraine and Raymond would share the residuary estate if proponent did not survive decedent. On the date of execution, decedent came to Mancuso's office, accompanied by proponent, who appears to have remained with him at all relevant points thereafter. Mancuso reviewed with decedent the revisions that she had made pursuant to her discussion with proponent. Decedent then indicated that he wanted to make additional provision for his siblings. Mancuso and he discussed the alternatives of a fixed amount or a percentage of the residuary, and decedent ultimately decided to leave 25 per cent of the residuary to Lorraine and Raymond, to be split equally between them. Mancuso then revised the draft accordingly and reviewed it with decedent, who approved it. After Mancuso printed a final version, the attesting witnesses were brought to decedent, and the will was executed by him, with the attesting witnesses executing a self-proving affidavit.

Although Mancuso was aware that decedent suffered from a mental disability and was receiving disability insurance benefits, she noted that he spoke clearly, with no halting speech, and had no trouble keeping up with their discussion. From decedent's part of that discussion, Mancuso concluded that he understood that he was making a will. Although proponent was present during these interactions, Mancuso perceived no prompting of the decedent by her. In her affidavit on this motion, Mancuso is clear that she would not have drafted the will or allowed decedent to execute it if she had any basis for concern about decedent's capacity to do so, a concern that she had been obliged to act upon professionally approximately ten times in the past.

The parties agree that this motion is ripe for decision, all discovery having been completed. As to the applicable legal standard, summary judgment is appropriate where the movant establishes a prima facie case for judgment on her pleading, and the non-movant fails to come forward with evidence that raises a material, triable issue of fact (*Matter of Korn*, 25 AD3d 379 [1st Dept 2006]; *Matter of Branovacki*, 278 AD2d 791 [4th Dept 2000]). Although such a motion should not be lightly granted, mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

On the issue of testamentary capacity, proponent has the burden of demonstrating that decedent was able to (1) appreciate the nature and extent of his property, (2) identify the natural objects of his bounty, and (3) understand the nature and consequences of executing a will (*Matter of Khazaneh*, 15 Misc 3d 515 [Sur Ct NY County 2006], citing *Matter of Kumstar*, 66 NY2d 691, 692 [1985]; *Matter of Buckten*, 178 AD2d 981, 982 [4th Dept 1984], *lv denied* 80 NY2d 752 [1992]). Proponent has more than met that burden, in view of the self-proving affidavit (in which the attesting witnesses aver that testator was “of sound mind, memory and understanding”), which is prima facie evidence of capacity (*Matter of Schlaeger*, ___ NYS2d ___, 2010 WL 2161138, *1 [1st Dept 2010]; *Matter of Leach*, 3 AD3d 763, 764 [3d Dept 2004]), and Mancuso’s testimony with respect to all three elements of testamentary capacity (*Matter of Dietrich*, 271 AD2d 894 [3d Dept 2000]). Decedent’s very insistence, on the date of execution, that his will include a sizeable bequest for his siblings demonstrates his independent ability to remember the persons who were natural objects of his bounty, to be aware of the

property to be affected by a will, and to know that the instrument in question would have such an effect.

Nevertheless, objectant offers voluminous medical and related records as proposed support for her claim that decedent's mental abilities had so declined by September of 2003 that he could not have been capable of making a valid will. These records do show that decedent's mental functions had become significantly impaired by then from what they presumably were when he was an accountant. Indeed, according to decedent's disability insurance application in February 2002, he was unable to do simple mathematical calculations, or to read and retain information as he had in the past, or to take notes of meetings without assistance. However, the inability to perform work as an accountant hardly amounts to an inability to execute a will, given the extremely undemanding standard of capacity applicable to wills (*Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]).

Moreover, it is not clear that the medical reports submitted by objectant speak to the level of decedent's capacity at the time the will was executed, which is the key inquiry (*Matter of McCarthy*, 269 App Div 145 [1st Dept 1945], *affd* 296 NY 987 [1947]; *Matter of Long*, 176 AD2d 1059 [3d Dept 1991]; *Matter of O'Donnell*, NYLJ, Oct. 28, 2008, at 35, col 2 [Sur Ct NY County]). The record nearest in time to the will execution is a report of decedent's rehabilitation psychologist, summarizing sessions held with decedent on September 8th, 15th, 22nd, and 30th of 2003. Although the report notes a diagnosis of "dementia of the Alzheimer's type" and a reduction in "linguistic and cognitive capacities" during the preceding several months, it also concluded that decedent "remains oriented in all spheres and is able to participate in many

decisions pertaining to his care.” In any event, as is now well-established, the mere fact of a diagnosis of Alzheimer’s or dementia does not, in and of itself, disprove testamentary capacity, if execution occurred during a lucid interval (*Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]; *Matter of O’Donnell*, NYLJ, Oct. 28, 2008, at 35, col 2; see *Matter of Morris*, 208 AD2d 733 [2d Dept 1994]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]; *Matter of Villani*, 28 AD2d 76 [1st Dept 1967]). Here, despite decedent’s diagnosis, the evidence demonstrates that at the very time of the execution decedent was lucid.

Objectant claims, however, that her “personal observations” of her brother indicate that “he lacked simple cognitive abilities,” including the ability to understand the nature of any legal document. Although the times at which such observations occurred are undisclosed, objectant does not refute the sworn statement of decedent’s former spouse, MaryAnn, that (based upon her own discussions with decedent) objectant appears to have never visited decedent during the last years of his life except (at proponent’s urging) on the day before he died. In sum, objectant has failed to create a genuine issue of fact as to decedent’s capacity to have effectively executed the propounded instrument.

As for the objection of undue influence, it raises an issue as to which objectant has the burden of proof. To satisfy that burden, objectant must adduce proof of motive, opportunity and the actual exercise of undue influence tantamount to a moral coercion restraining decedent’s independent action and destroying his free will (*Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Korn*, 25 AD3d 379 [1st Dept 2006]; *Matter of Cavallo*, 6 AD3d 434 [2d Dept 2004]; *Matter of Coniglio*, 242 AD2d 901 [4th Dept 1997]). The circumstance that one is the sole or major

legatee is not, by itself, evidence of the exercise of undue influence (*Walther*, 6 NY2d at 49). In light of the circumstances surrounding the bequest to proponent, as shown by the evidence that she has submitted on the subject, her bequest appears to have arisen as a natural expression of decedent's affection for and gratitude to her as his companion (*Matter of Randall*, 899 NYS2d 720 [4th Dept 2010]).¹

Objectant for her part has provided no evidence that such bequest was instead the product of proponent's undue influence. In place of such evidence, objectant rests only on her own self-serving speculations that it occurred. This is not to overlook objectant's contention that proponent held a confidential relationship to decedent and that she is therefore obliged to avoid an inference that her benefit under the will was unfairly derived (*Matter of Bach*, 195 AD2d 457 [2d Dept 1993]). But, even assuming that proponent occupied such a relationship and therefore has that burden, any such inference would be overcome by proponent's uncontroverted proofs that the bequest to her was fair and that decedent exercised independent judgment in making and executing the instrument (*Matter of Bustanboy*, 262 AD2d 407 [2d Dept 1999]). Indeed, as the record shows, to the extent proponent had any role at all in the making of the propounded instrument, it was to facilitate the process by which her own bequest under the first draft was by

¹As decedent's brother stated in an affidavit in support of the motion, "Betty Jean Marolla was totally dedicated to Ralph's well being and was lovingly attentive to him in the last years when he was ill. Her attention to his care and needs went above and beyond what anyone could reasonably expect of even a spouse or family member."

Objectant offers no evidence to contradict this account.

degrees reduced for the sake of increasing the interests of objectant and sibling Raymond.²

Accordingly, for the reasons discussed above, the objections based upon lack of testamentary capacity and undue influence are dismissed, and summary judgment is granted.

Settle probate decree.

Dated: June 15, 2010



SURROGATE

²Given this resolution, the court considers it unnecessary to address that alternative part of proponent's motion seeking dismissal of the objections for failure to state a claim (*see* CPLR 3211[a][7]).