

Matter of Cubic

2011 NY Slip Op 30110(U)

January 11, 2011

Sur Ct, Nassau County

Docket Number: 26960

Judge: Edward W. McCarty

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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
 for the Will of

File No. 346608

CYRIL J. CUBIC,

Dec. No. 26960

Deceased.
 -----x

In this contested probate proceeding, the proponent, Diane M. Fraile, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the propounded instrument, dated November 9, 1994, to probate. The objectant is the guardian ad litem appointed by this court on April 30, 2009 to represent the interests of the unknown heirs. For the reasons set forth below, the motion is granted.

FACTUAL BACKGROUND

Cyril J. Cubic died on November 25, 2003. The will was offered for probate on May 14, 2007 by Diane M. Fraile, who is a niece of decedent's predeceased wife and the nominated executor. The proponent and her sister, Lynn M. Smith, are the sole legatees under decedent's will. A guardian ad litem was appointed by the court to represent the unknown heirs.¹ Preliminary letters issued to Diane on April 6, 2010.

THE MOTION

In support of the motion for summary judgment, with exhibits annexed, proponent's counsel submitted an additional affirmation to which he attached his previously submitted affirmation, which he had filed in response to a prior motion filed by the guardian ad litem

¹Of decedent's 22 known distributees, 17 executed and filed waivers and consents to the probate of the will. The remaining 5 known distributees were served with citation; they defaulted.

for court-ordered subpoenas duces tecum and other records beyond the time limits prescribed by 22 NYCRR 207.27.² The affirmation filed by proponent's attorney addresses the issues presently before the court and supports the motion for summary judgment. Proponent asks that the propounded will be admitted to probate on the grounds that there are no triable issues of fact with regard to its validity.

In opposition to proponent's motion for summary judgment, the guardian ad litem submitted an affirmation which asserts the following:

(1) Lack of Testamentary Capacity

Respondent argues that the proponent bears the burden of proving testamentary capacity and that she has failed to do so. Moreover, respondent reiterates her argument, put forth in her prior motion, that lack of testamentary capacity is demonstrated by decedent's references to Diane and Lynn as his sole heirs, when, in fact, they are not decedent's heirs at law and decedent has other relatives who are distributees. Respondent reasserts that decedent's incorrect description of his familial relationship with his nieces by marriage demonstrates that decedent did not know the natural objects of his bounty.

(2) Lack of Due Execution

The second argument raised by respondent in her opposition to the motion for summary judgment concerns decedent's alleged failure to duly execute the propounded instrument. The primary basis for this argument is the subsequent disbarment of the attorney who supervised the will execution.

²This section limits discovery in connection with an examination before trial in a contested probate proceeding, absent special circumstances, to three years prior to the execution of the propounded will and two years subsequent, or until the decedent's date of death, if sooner (the three-two rule). The court denied the motion in Decision No. 26526, dated August 5, 2010.

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 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 the testator's bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although the testator need not have a precise

knowledge of his or her assets (*Matter of Fish*, 134 AD2d 44 [3d Dept 1987]), the testator 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]).

The guardian ad litem’s assertion that the decedent lacked testamentary capacity relies upon decedent’s references to the nieces of his wife as his own nieces and as his sole heirs. As discussed in this court’s prior decision, the decedent was a postal worker and not an attorney; there is no reason to believe that decedent was familiar with the distinctions between legal terms such as heirs, legatees and distributees. Accordingly, decedent’s transposition of commonly misused legal nomenclature to identify family relationships can hardly be deemed indicative of a lack of capacity. Again, as stated by the court in Decision No. 26526, the most likely explanation for decedent’s reference to Diane and Lynn as his sole heirs is that he intended the term to mean that they were the only people who would receive property under his will. The decedent’s technically incorrect use of the term “heirs” in this context does not support movant’s contention that “the decedent was unaware of his heirs and therefore lacked testamentary capacity,” especially because the record uniformly reflects an undisputed, well-established and long-term

loving familial relationship between the decedent and Diane and Lynn, which included weekly and holiday dinners over a period of approximately 22 years. Therefore, when decedent referred to these women as his nieces, it should not be surprising or presumed reflective of anything other than mutual affection, despite the fact that they were technically nieces by marriage rather than by blood. The court does not find the arguments put forth by the guardian ad litem to be persuasive. The court has also reviewed the transcripts of the examinations of all three witnesses to decedent's will execution and finds that the testimony of the witnesses supports movant's position that decedent had testamentary capacity when he executed his will on November 9, 1994.

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. In their deposition testimony, the attesting witnesses stated that the decedent was of sound mind at the time of the execution of the propounded 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 of 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.

The motion for summary judgment dismissing the objection based upon a lack of testamentary capacity is granted.

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, no factual basis has been offered for questioning the due execution of this will other than the subsequent disbarment of decedent's attorney, which occurred 13 years after he supervised the execution of the propounded will. The attorney's supervision of decedent's will signing ceremony creates a presumption that the decedent properly executed his last will and testament (*Matter of Collins*, 60 NY2d 466 [1983]), *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]). Objectant has put forth no facts to rebut the presumption in this case. Despite respondent's assertions otherwise, the testimony elicited during the SCPA 1406 examinations of

the witnesses fully supports movant's position that the will was duly executed. Accordingly, the motion for summary judgment dismissing the objection based upon a lack of due execution is granted.

The guardian ad litem is directed to submit an affirmation of legal services within 14 days hereof so that the court may fix her fee.

The propounded instrument will be admitted to probate. Letters testamentary will issue to Diane M. Fraile upon her duly qualifying.

Settle decree.

Dated: January 11, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court