SURROGATE'S COURT : NEW YORK COUNTY

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Petition for Probate of the Will of

ROSE BADER,

Deceased.

- -x

File No. 3313/08

A N D E R S O N, S.

In this contested probate proceeding, decedent's son-in-law ("proponent") moves for summary judgment dismissing objections filed by decedent's granddaughter ("objectant"). The propounded instrument, dated August 27,1986, was executed in Florida approximately twenty-two years prior to decedent's death on April 10,2008.

Objectant is the sole child of decedent's pre-deceased son. She alleges that the will was not validly executed and is the product of fraud or undue influence exerted by the proponent and his wife (decedent's only daughter). She does not question decedent's testamentary capacity.

Decedent died at the age of 100. She was survived by her daughter, who is married to proponent, and her granddaughter (the daughter of decedent's pre-deceased son). Her estate is valued in excess of one million dollars. At the time of her death decedent was a resident of New York City, having returned to New York in 2001 after residing "for several decades" in Florida.

It is not disputed that decedent executed the propounded

instrument, while she was living on her own in the Florida home she and her husband shared until his death on April 29, 1986. While living in Florida, decedent maintained a close relationship with her daughter, her son-in-law, and their issue, all of whom lived in New York City.

Four months before executing the will, which disinherited her only son, she and her son became estranged after a bitter dispute at the funeral of decedent's husband. Their estrangement lasted until her son's death in February of 2008.

Objectant, who in 1986 was an adult living in New York, testified in her deposition that, because of the argument between decedent and her father, she did not travel to Florida to attend her grandfather's funeral or to sit shivah with her grandmother. She further testified, however, that she and decedent remained in contact until decedent's death (over the telephone and through periodic visits by objectant to decedent's home), but that her grandmother chose to keep such contacts secret from her daughter and the rest of the family. This testimony was uncorroborated.

In the propounded instrument decedent nominated her son-in-law as executor; bequeathed her jewelry and personalty to her daughter; and gave her residuary estate to the daughter's children.

Proponent asserts that the will was properly executed and was not the product of undue influence or fraud. Rather, proponent

claims that the will was the natural expression of decedent's wishes. It reflects the long-standing bitter relationship between decedent and her son, and her gratitude to her daughter and son-in-law for their consistent care of decedent and her husband, including the purchase of their apartment in Florida when the unit was converted into a co-operative. Finally, proponent argues that the objections are wholly conclusory and speculative and that objectant has, therefore, failed to present any triable issue of fact.

Notwithstanding objectant's concession to decedent's independent living arrangements at the time she executed the will, objectant alleges that the instrument was the result of undue influence exerted from afar by proponent and his wife, as an incident of their long role as providers of financial assistance to decedent and her husband.

Discussion

The law regarding the availability of summary judgment is well known and will not be repeated in this decision (Phillips v. Kantor, 31 NY2d 304; Westhill Exports, Ltd. v. Pope, 12 NY2d 491; Esteve v. Abad 271 AD725).

In the context of a probate proceeding, summary judgment is available and, indeed, should not be withheld, where a proponent meets his burden of proving testamentary capacity and due execution, and objectant fails to raise material issues of fact

requiring a trial on the issues of fraud and undue influence (Matter of Coniglio,242 A.D.2d 901; Matter of Parravani, 211 AD2d 965, 966) Matter of Cioffi, 117 AD2d 860; Matter of Goldberg, 180 AD2d 528; Matter of Young, 289 AD2d 725; Matter of O'Hara, 85 AD2d 669).

Testamentary Capacity

Even when objectant does not contest decedent's testamentary capacity, proponent must meet his burden to show that decedent understood the nature and extent of her property and the identity of the objects of her bounty (SCPA 1408; Matter of Kumster, 66 NY2d 691, rearg denied 67 NY2d 647; Matter of Dix, 13 NY2d 846; Matter of Neuman, 14 AD3d 567; Matter of Burke, 82 AD2d 260; Matter of Kaufman, 20 AD2d 464, aff'd 15 NY2d 825).

Proponent correctly asserts that, in the absence of evidence to the contrary, there is a presumption that the testatrix possessed testamentary capacity (Matter of Smith, 180 AD 669; Matter of Hollenbock, 318 NYS2d 604, aff'd 37 AD2d922). Here, the objectant conceded in her deposition that decedent was strong and "mentally all there". The attorney draftsperson testified that decedent had full capacity. Attached to the will is a notarized affidavit of the witnesses attesting, inter alia, to her capacity at the time the instrument was executed. Objectant has offered no evidence to the contrary. Given these facts, proponent, therefore, has met his burden of proving decedent had testamentary capacity

to make a will.

Due Execution

Proponent bears the burden of establishing that the will was duly executed pursuant to the formal requirements of execution and attestation (EPTL 3-2.1). Here, the attorney draftsperson testified that he supervised the execution. Therefore, proponent is entitled to a presumption of regularity (see, Matter of Kindberg, 207 NY 220, 228; *Matter of Esberg*, 215 AD2d 655). He also testified to the details of the execution ceremony and to his adherence to proper procedure. Finally, the will contains an attestation clause, which constitutes further evidence that the will was validly executed (Matter of Cottrell, 95 NY 329; Matter of Warsaski, NYLJ, January 4,1996 (Surrogate's Court, New York County); Matter of Bustanoby, NYLJ, December 30, 1997, aff'd 262 AD2d 407).

Objectant failed to offer facts contrary to or inconsistent with proponent's factual assertions. To the contrary she herself admitted in her deposition that she had no knowledge of the details of the execution ceremony. Similarly, her motion papers are completely devoid of any factual assertions concerning the validity or mere existence of the execution of decedent's will.

Objectant has failed to overcome the presumptions of regularity and the proponent's supporting prima facie proof of due execution. Accordingly, her objection as to due execution is

dismissed.

Undue influence and Fraud

Objectant bears the burden of proving that the will was the product of undue influence or fraud on the part of proponent (Matter of Tabaczynski, 217 AD2d 965); Matter of Eastman, 63 AD3d 738).

The elements of a claim of undue influence are motive and opportunity to exercise such undue influence, as well as evidence that undue influence was actually wielded at the time the will was executed (*see*, Matter of Walther, 6 NY2d 49, 55). Absent a showing of the last element, courts have repeatedly stressed that evidence of opportunity and motive are insufficient to raise a triable issue as to whether the will was coerced (Matter of Zirinsky, 43 AD3d 946, 947; Matter of Fiumara, 47 NY2d 845, 846; Matter of Walther, 6 NY2d 49, 55; Matter of Herman, 289 AD2d 239; Matter of Ryan, 34 AD3d 212).

Objectant must show that the influence exerted amounted to a moral coercion which restrained decedent's independent action and destroyed her free agency, or which constrained her to do something that was against her free will (Children's Aid Socy. of City of N.Y. v. Loveridge, 70 NY 387, 394; Matter of Walther, 6 NY2d 49, 53; Matter of Burke, 82 AD2d 260, 269).

In the instant proceeding, objectant has failed to submit any evidence whatsoever that proponent or his wife compelled or

constrained decedent to do anything against her free will. Indeed, she testified that she knew of no specific acts and/or threats made by proponent or anyone else that would substantiate a claim that decedent was coerced into executing her will.

Objectant acknowledges that decedent had become estranged from her father shortly before the will was executed and further acknowledges that at the time decedent executed her will, she was physically and mentally fit, living on her own in Florida, tending to her own bills and household, driving her own car, and freely traveling back and forth between Florida and New York. Additionally, objectant concedes that at that time decedent's daughter and her family were living thousands of miles away in New York. Of note, also, is her admission in her deposition that decedent never told her she was fearful of naming her in her will, or told her she even wanted to do so.

Proponent offered testimony of the attorney draftsperson that decedent came to his Florida office unaccompanied. He also testified that the will was drafted and executed without any involvement from proponent or any family member. The court notes that a long-distance physical separation and lack of involvement by a proponent in the will's drafting and execution, such as we have here, has been held to be inconsistent with any inference of undue influence, even where the disinherited party is a close family member (Matter of Ryan, 34 AD3d 212).

Ojectant is unable to point to any specific action taken or threat made that might have caused decedent to disinherit her. In addition, she admits that decedent never expressed any intent to name her in a will. Nevertheless, objectant surmises that her grandmother's desire to keep their relationship a secret from her daughter and son-in-law is per se proof that decedent's will was the product of intimidation by her daughter or her son-in-law. Such a conclusion is merely speculative and wishful thinking on her part.

Objectant further surmises that since her grandmother left the bulk of her estate to her other grandchildren, she could not have wanted to disinherit objectant, who was also a grandchild and who was also loved by decedent. Such wishful supposition, however heart-rending, does not amount to a showing of undue influence by proponent. This is especially true where, as here, the evidence is not inconsistent with the possibility that the will actually expresses the decedent's voluntary intent(Matter of Walther 6 NY2d 49; Matter of Williams, 141 NY 572). Where the surrounding circumstances are equally consistent with the assumption that the will reflected the decedent's wishes, an inference of undue influence cannot be drawn (Matter of Walther, 6 NY2d 49; Matter of Ryan, 34 AD3d 212). Here, the evidence presented by both proponent and objectant is consistent with the likelihood that the will was a result of decedent's estrangement

from her son and her disappointment at objectant's failure to attend her grandfather's funeral, balanced against decedent's close relationship with her daughter's family and her gratitude for the family's long standing emotional and financial support.

The objectant has offered only conclusory allegations and speculation that proponent or anyone else actually exercised undue influence over the decedent (Matter of Weltz, 16 AD3d 428, 429; Matter of Dubin, 54 AD3d 945, 947; Matter of Coopersmith, 48 AD3d 562, 563; Matter of Bustanoby, 262 AD2d 407, 408). Accordingly, this objection is also dismissed.

Last, we turn to the allegation that the will was a product of fraud. To substantiate such a claim, objectant is required to demonstrate that someone knowingly made a false statement to the decedent which caused her to dispose of her property in a manner materially different from the disposition she would have chosen in the absence of that statement (Matter of Eastman, 63 Ad3d 738; Matter of Evanchuk, 145 AD2d 559, 560; see Matter of Zirinsky, 43 AD3d 946, 948; Matter of Gross, 242 AD2d 333, 333-334; Matter of Bianco, 195 AD2d 457, 458).

Again, objectant has failed to produce a modicum of proof that anyone induced decedent to execute her will based on a false statement. Equally damaging to objectant's claim is the absence of any reference to the existence or proof of fraud in her responsive papers. Accordingly, this objection is dismissed.

Based on the foregoing, the proponent's motion for summary judgment dismissing objections to probate is granted.

This decision constitutes the order of the court.

Nora S. Anderson

SURROGATE

Dated: January 26 ,2011