SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding, Will of

CHRISTINE M. CONNER,

Deceased.

File No. 2009-1427

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G L E N, S.

Kyndell Reid, the preliminary executor of the estate of Christine Conner, has moved for summary judgment dismissing the objections to probate filed by Gary Campbell, the decedent's grandnephew.

The decedent died on March 28, 2009, leaving an estate of approximately $500,000. She was survived by two grandnephews, Glenn Campbell and the objectant herein, who are the sons of Joyce Campbell, the decedent's pre-deceased niece. Under the proffered instrument, dated February 5, 2006, the decedent makes nominal cash bequests to her grandnephews and gives her entire residuary estate to Kyndell, her long-time friend. Gary claims that (1) the decedent lacked testamentary capacity, (2) the will was not duly executed, and (3) the will was the product of Kyndell's undue influence and fraud.

On a summary judgment motion, the movant 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 Hospital*, 68 NY2d 320, 324 [1986]). Once the movant has made out a prima facie case, the burden shifts to the opposing party to

provide proof establishing that there are material questions of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In determining whether such factual issues exist, the court must view the evidence in a light most favorable to the non-moving party (*see Council of City of New York v Bloomberg*, 6 NY3d 380, 401 [2006]).

Testamentary Capacity

The proponent has the burden of establishing prima facie that the testator (1) understood the nature of a will and its consequences, (2) knew the nature and extent of the property she was disposing of, and (3) knew those who would be considered the natural objects of her bounty and her relations with them (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]).

Kyndell has met such burden: at their 1404 depositions, the attesting witnesses, Eloise Paterson, Daniel Paterson and Neavis Ramnath, testified that the decedent was alert and aware of her surroundings at the time of the will execution in her apartment. The Patersons, a couple who were the decedent's friends, and Ms. Ramnath, the decedent's long-time health care aide, further testified that the will was read to the decedent twice and that she appeared to understand its contents and the significance of executing her will. Ms. Ramnath also testified that the decedent was aware of her assets and had frequently expressed a desire to leave her apartment to Kyndell now that her niece Joyce was no longer alive.[1] Additionally, Kyndell has submitted an affidavit from Dr. Jenny Walker, the decedent's treating physician, who avers that although the decedent suffered from Parkinson's Disease and gradual dementia, she was "generally functional, had the

[1] Joyce Campbell, who died on January 3, 2005, was the sole beneficiary under the decedent's prior will, dated December 4, 2000, which Gary has cross-petitioned for admission to probate. Under the terms of the 2000 will, Gary and Glenn Campbell are the contingent beneficiaries after Joyce.

ability to reason, was aware of her surroundings, make her wishes known and make decisions for herself and her property." Kyndell also submits affidavits from the decedent's neighbors and friends, all attesting to the decedent's functional capacity.

Gary's evidence in response fails to raise a triable issue of fact. He relies heavily on the decedent's medical records to support his claim that the decedent's mental abilities had so declined that she was incapable of making a valid will. It is undisputed that the decedent suffered from Parkinson's Disease, dementia and arthritis beginning in 2003. Such diagnosis, however, does not, in and of itself, disprove testamentary capacity. Rather, Gary must show that the decedent lacked testamentary capacity at the time she executed her will (*see Gala v Magarinos*, 245 AD2d 336 [2nd Dept, 1997]); *Matter of O'Donnell*, NYLJ, Oct 28, 2008, at 35, col 2 [Sur Ct NY County]). Toward this end, Gary submits an affidavit from Marie Phillips, a registered nurse, who monitored the decedent's health for the last ten years of her life. Ms. Phillips avers that the decedent's physical and mental condition deteriorated from 2003 through 2006. She bases this assessment on reports and notes that she made during her routine visits with the decedent. Specifically, her report dated January 30, 2006 (six days *before* the will execution) states that the decedent was "alert" but had "difficulty maintaining a conversation". Similarly, her report dated April 7, 2006 (two months *after* the will execution) reflects that the decedent was again "alert but not very talkative" and that the decedent "occasionally mumbles but not clear what she is saying." Other than confirming that the decedent had limited verbal communication, which was not inconsistent with her diagnosis of Parkinson's disease, this evidence does not rise to the level of proving the decedent lacked the very minimal cognitive ability that the law requires for making a will (*see Matter of Seagrist*, 1 AD 615 [1st Dept

1896]["The same clearness of comprehension and ability of expression which is required to enable a man to enter into a contract need not exist to enable him to make a valid will."]). The same can be said of Gary's own testimony concerning the difficulties the decedent experienced in attempting to communicate with him, which he erroneously equates with a lack of testamentary capacity. Accordingly, Gary has failed to rebut petitioner's evidence of decedent's testamentary capacity, and the court therefore dismisses this objection.

Due Execution

Based on the testimony of the three attesting witnesses, Gary concedes that the will was executed following the requirements of EPTL 3-2.1. Accordingly, the court dismisses the objection relating to the failure of due execution.

Fraud

It is the objectant's burden to prove that the proponent made a false statement to the testator which caused the testator to execute a will disposing of her property differently from the way she would have disposed of it in the absence of such misrepresentation (*Matter of Clapper*, 279 AD2d 730, 732 [3rd Dept 2001]). However, Gary has provided no such evidence and has essentially abandoned this claim. Accordingly, the court dismisses his objection based on fraud.

Undue Influence

The objectant also has the burden of proving undue influence *(Matter of Kindberg*, 207 NY 220, 228 [1912]). To prevail, Gary must show that Kyndell's influence rose to the level of "moral coercion" which restrained decedent's independent action and free agency. He must also show that Kyndell had the motive, opportunity, and actually exercised such undue influence (*see Matter of Walther*, 6 NY2d 49, 53 [1959]). While direct evidence of undue influence is seldom

available, it may be shown by "affirmative evidence of facts and circumstances from which the exercise of such undue influence can fairly and necessarily be inferred" (*Matter of Malone*, 46 AD3d 975, 977 [3rd Dept 2007], quoting *Matter of Bundy*, 217 App Div 607, 612 [1926]).

The record shows that the decedent had a close relationship with her niece Joyce and Joyce's family. They were beneficiaries under the decedent's prior testamentary plan, and Joyce was also the decedent's attorney-in-fact. But the record also shows that Kyndell was no stranger to the decedent, the latter having known Kyndell from childhood since Kyndell's grandmother had been friends with the decedent and her sister. While it is disputed as to what extent Kyndell was involved in the decedent's care, it is uncontroverted that Kyndell was instrumental, for example, in securing Medicaid services for the decedent in 2003. Gary alleges that after Joyce died, Kyndell took over and controlled the decedent's affairs. Not only did Kyndell become the decedent's attorney-in-fact, but more importantly, she was responsible for making sure the decedent continued to receive the Medicaid benefits which paid for the services of Ms. Ramnath, her health care aide, and decedent's medical care.

Objectant has, at the very least, raised a triable issue of fact as to whether a confidential relationship existed between decedent and Kyndell (*see e.g. Cowee v Cornell*, 75 NY 91, 100 [1878] [whether relationship is confidential is a question of fact]; *Matter of Bach*, 133 AD 2d 455, 456 [2nd Dept 1987] [same]; 9 Warren's Heaton, Surrogate's Court Practice § 117.02 [3][c]["If the relationship between the parties is not so clear i.e., when it cannot be determined without further inquiry that one party is more dependent upon and subject to the control of another, the determination of a confidential relationship becomes a question of fact"]).

It is generally understood that once a confidential relationship is found, where there is

also evidence of its exploitation the proponent of the will is required to offer an explanation for the testamentary disposition; in the absence of such explanation an inference of undue influence is permissible, but not required (*see e.g. Matter of Smith,* 95 NY 516,523 [1884]; *Matter of Bartel*, 161 Misc 2d 455,458 [Sur Ct New York County 1994], *affd sub nom. Cordovi v Karnbad*, 214 AD 2d 476 [lst Dept 1995]).

The Pattern Jury Instructions also teach that "[f]actors other than a confidential relationship must be found before any obligation arises on the part of the beneficiary to explain" [2] (2 NY PJI 7:56, at 1441 [2011]). The applicable instruction and commentary include several such factors, all of which are present here:

> (1) Whether the proponent secured the attorney draftsperson:
> The record indicates that Kyndell hired Mr. Meachem, an attorney she knew, rather than decedent's long time attorney Mr. Ellis.
>
> (2) Whether the proponent took an active part in the will's execution:
> Kyndell was present at the meeting in decedent's apartment at which the terms of the will were discussed, and supervised the execution, including reading the will to decedent.
>
> (3) Whether proponent was the principal beneficiary:
> Kyndell receives the entire residuary estate after relatively nominal bequests.
>
> (4) Whether decedent acted without independent advice:
> There is no indication of any independent advice.
>
> (5) Whether the plan of disposition of the proffered will differs radically and without apparent reason from decedent's prior will:
> Under a prior, 2000 will, Joyce was the sole beneficiary, with her children, including objectant, the contingent beneficiaries.

Because objectant has raised a triable issue of fact as to the degree of decedent's reliance

[2]The burden of proof never shifts from the objectant. Instead, if the beneficiary/proponent is required to explain, the trier of fact may, but need not infer that undue influence was applied (*see* NY PJI 7:56.1 and Comment at 1443 [2011]).

on proponent (the confidential relationship issue) and, if that is decided in objectant's favor, whether that dependence was exploited to create undue influence, summary judgment as to the objection of undue influence is denied.

The court will contact the parties to schedule a conference.

This decision constitutes the order of the court.

SURROGATE

Dated: April 13, 2011