SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Will of

PHILIP CHALADOFF,
Deceased.

File No. 349991

Dec. No. 27678

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In this contested probate proceeding, the petitioner, Ellen Jahos, moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the objections to probate filed by the respondent, Michael Chaladoff.

The decedent, Philip Chaladoff, died on October 17, 2007, survived by his daughter, Ellen Jahos, the petitioner, and by his son, Michael Chaladoff, the respondent. An instrument purported to be the last will and testament of the decedent, dated October 12, 2007, and naming the petitioner as the executor, was submitted for probate by the petitioner. The propounded instrument leaves the decedent's entire residuary estate to the petitioner and makes no provision for the respondent. Preliminary letters testamentary were issued to the petitioner by this court on February 7, 2008.

The respondent filed objections to probate alleging that: (1) on October 12, 2007, the decedent was not competent to make a will as he was not of sound mind or memory; and (2) that the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by fraud or undue influence practiced upon the decedent by the petitioner or others acting in concert with her.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue

finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman,* 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his or her proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding testamentary capacity, execution of the will, 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]).

TESTAMENTARY CAPACITY

The petitioner has the burden of proving testamentary capacity. It is essential that the 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 objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although he need not have precise knowledge of his assets, he 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]).

The propounded instrument was executed by the decedent five days before his death, while he was a patient in the intensive care unit at Glen Cove Hospital. The attesting witnesses were a social worker and a nurse employed by the hospital. The execution of the instrument was supervised by petitioner's counsel, the attorney who had drafted it.[1]

The social worker who witnessed the execution of the decedent's purported will testified at her deposition that at the time of the execution, the decedent "was weak, but he was clear" (Skibins deposition p. 53, line 22). The nurse who witnessed the execution of the decedent's purported will testified at her deposition that the decedent was neither confused nor disoriented, and affirmed that he was "cognitive" on the day of the execution (Donovan deposition p. 15, lines 21-22). The attorney draftsperson testified at her deposition that it was her "distinct impression" that the decedent was "thoroughly lucid and competent" when he executed the

[1] The same attorney had also prepared wills for the decedent in 1993 and 2005, in which the residuary estate was bequeathed in equal shares to both of his children.

instrument (Pernick deposition p. 45, lines 20-21). Based upon the foregoing, the petitioner has established prima facie that the decedent was of sound mind and memory when he executed the propounded instrument (EPTL 3-1.1).

However, in opposition to the petitioner's motion for summary judgment, the respondent relies upon the medical records of the decedent's final hospitalization.[2] These records include an "Adult DNR Consent Form" signed by the petitioner the day before the execution of the purported will, on behalf of the decedent because, according to the terms of the form signed by the decedent's attending physician and concurring physician, the decedent lacked the capacity to make an informed decision himself. While it may require less capacity to sign a will than a do not resuscitate order, the decedent's inability to take part in the decision-making process as to his course of treatment and the hospital's reliance upon his daughter, the petitioner, to make such decisions for him, raise an issue of fact as to the decedent's mental capacity (*Matter of Brower*, 4 AD3d 586 [3d Dept 2004]).

In addition to the decedent's inability to sign his own do not resuscitate order the day before he executed the will at issue herein, the medical records from his hospitalization show that the decedent had been administered both Percocet and morphine for pain in the hours before the purported will was executed. While the nurse who witnessed the will testified at her deposition that the dosage of morphine given to the decedent "is really not a big dose of morphine" (Donovan deposition p. 20, lines 23-24), the decedent's medical records describe him as being

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[2] By stipulation dated June 14, 2011, counsel for the petitioner and counsel for the respondent both agreed that uncertified copies of the medical records of the decedent would be admissible and usable for the purposes of both summary judgment and trial in this matter and be deemed to be of the same force and effect as if such documents were certified.

"barely arousable" on the day of the will execution.

The medical records introduced by the respondent are sufficient to raise a triable issue of fact as to whether the decedent possessed testamentary capacity at the time he executed the propounded instrument.[3] Accordingly, on the issue of testamentary capacity, the petitioner's motion for summary judgment is denied.

UNDUE INFLUENCE AND FRAUD

In order to prove undue influence, the respondent must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*Matter of Walther,* 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions, Civil, 7:55). It is seldom practiced openly, but it is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept

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[3] Since the court has determined that the uncertified medical records of the decedent, which were deemed admissible by both sides, are sufficient to raise a triable issue of fact with regard to the testamentary capacity of the decedent, the court need not consider the admissibility of the unsigned, unaffirmed report of Dr. Snyder submitted by the respondent in opposition to the motion for summary judgment, nor need the court consider the physicians' affidavits belatedly submitted by the respondent, which submissions were objected to by the petitioner.

2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]).

The totality of the circumstances surrounding the execution of the decedent's will and the change in beneficiaries of various non-testamentary assets belonging to the decedent during his hospitalization, while his physical state was rapidly deteriorating and his mental capacity was diminished, are sufficient to raise a triable issue of fact as to whether the petitioner may have exerted undue influence upon the decedent. Accordingly, on the issue of undue influence, the petitioner's motion for summary judgment is also denied.

To prevail upon a claim of fraud, the respondent must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to the decedent to induce him to execute a will that disposed of his property in a manner contrary to that in which he would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). The respondent has failed to sustain his burden on his claim of fraud and therefore, so much of the petitioner's motion for summary judgment as seeks to dismiss the respondent's objection on the ground of fraud is granted.

CONCLUSION

The petitioner's motion for summary judgment is granted with regard to dismissal of the objection of fraud, but is otherwise denied.

This matter will appear on the court's calendar for conference on March 21, 2012, at 9:30 a.m. to schedule a trial.

Settle order on notice.

Dated: February 28, 2012

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

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