SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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Probate Proceeding in the Estate of

MAX WIESELTHIER,

Deceased.

File No. 2007-0851

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ANDERSON, S.

In this probate proceeding in the estate of Max Wieselthier, objectant (a non-profit organization) seeks summary judgment denying probate to an instrument executed by Mr. Wieselthier as a codicil to his will. The motion rests upon three purportedly separate objections (Numbers 3, 5, and 6), which in substance all allege that the codicil was not duly published and therefore fails for lack of due execution (EPTL 3-2.1[a][3]).

Decedent died on December 26, 2006, at the age of 89, survived by two sisters and six children of predeceased siblings. The date-of-death value of his estate is estimated at approximately $1.2 million. Between December 1998 and June 2006, decedent had executed four testamentary instruments, the last of which is being propounded as his will along with the codicil now in issue. All of the four instruments executed prior to the codicil contained pre-residuary pecuniary bequests (the last of which leaves a total of $600,000 to four individuals, including proponent, one of decedent's nieces). All four instruments contained the same provision for the residue, leaving 28% to movant, the same percentage to two other non-profit organizations, and 16% to a fourth such organization. Under the first three instruments, decedent named one of his sisters as executor, with proponent named as a substitute or successor fiduciary; under the fourth instrument, decedent named proponent as executor.

The Facts

The following recital of facts is based upon depositions of six individuals: the two attesting witnesses; a patient representative where decedent was hospitalized on the day in question; a grandnephew of decedent who was by decedent's side for much of the time in question; the proponent; and a lawyer whom decedent consulted the day after the codicil was executed. The deponents were deposed between two to three years after the will in question was execution in question, and they testified that they did not remember all of the salient details. To the extent that one or more of the witnesses recalled specifics, the narrative below is based on such recall only to the extent that it was uncontradicted.

In the early morning of August 23, 2006, decedent was brought to the emergency room of Mt. Sinai Hospital, suffering from shortness of breath. Within a few hours, he was transferred to the hospital's medical intensive care unit (the "MICU"), where he remained at all times relevant to the present motion. Although proponent lived hundreds of miles away, decedent had designated her as his health care proxy, and she was notified of his admission to the hospital shortly after his arrival. Proponent in turn alerted one of decedent's grandnephews, who was living in New York City at the time and upon whom decedent had come to rely to meet some of his practical needs. When the grandnephew arrived at the MICU, at about 10 a.m., decedent was outfitted with a ventilator called a "BiPap," which aided his breathing through the use of a face mask. At some point thereafter, and but for brief intervals when the BiPap was re-engaged, a smaller device was used to assist decedent with his breathing. At no time was decedent unable to communicate orally.

Shortly after the grandnephew arrived at the MICU, decedent told him that he had decided

to change his will by omitting the provisions for charities. Decedent further told him that he wanted his residuary assets to be distributed as proponent, his executor, would choose. When the grandnephew suggested that decedent consult with the lawyer who had prepared all of his prior wills, decedent rejected the idea in no uncertain terms, noting that the lawyer had increased his rates and that decedent wanted nothing more to do with him. At decedent's behest, the grandnephew made inquiries of hospital staff whether someone could draft a will for decedent. When the grandnephew advised decedent that no such service was available, decedent directed him to contact proponent to ask her to type out an instrument making the one change to his will that he had described; decedent himself was not in a position to speak to proponent directly, since there was no land line within his reach, and the use of cell phones was not allowed in the MICU. After several phone calls between the grandnephew and proponent, to clarify the content of the proposed instrument and to arrange for its transmission to decedent by the patient representative, proponent typed out a one-page draft that read as follows:

> "Max B. Wieselthier, of the City of New York, County of New York, and State of New York, which I declare to be my domicile, do hereby amend my Last Will and Testament dated June 9, 2006 as follows:
>
> The charitable contributions in paragraph "SECOND" (page 1) are to be deleted; instead, the same total amount of the residue is to be distributed by my Executor, Alice K. Gordon, as she sees fit."
>
> Signed _____
> Max B. Wieselthier
>
> Witness _____

residing at _____

Witness _____

residing at _____

Subscribed and sworn before me this twenty-third day of August, 2006.

_____

Notary Public

At about mid-afternoon, proponent faxed the draft to the patient representative, who later relayed it to the grandnephew. The grandnephew read the draft twice to decedent, who then asked for his reading glasses in order to read the draft for himself. The grandnephew asked decedent if the terms were what he wanted, and decedent responded that they were. The grandnephew asked decedent if there was anything that he wanted changed, and decedent responded, "No."

At this point, the grandnephew asked the patient representative to arrange for witnesses and a notary public to come to the MICU. It was the type of request that the patient representative had handled before. Soon thereafter, the patient representative, herself a notary, summoned to decedent's bedside two other members of the patient services staff. Although at her deposition the patient representative did not purport to remember her exact words, she testified that, "I would say we need two witnesses for a will versus a document. I wouldn't say document[.] I would say will."

When the representative and her two colleagues arrived at decedent's bedside, the draft codicil was lying next to him on an over-bed food tray, where he had placed it after looking at it a

few minutes earlier. Following a verbal exchange between decedent and the three hospital employees, in which decedent said something that caused the others to chuckle, the patient representative commented that her colleagues were present as witnesses to a testamentary instrument (whether she said codicil or will or amendment to a will is not clear). One of the witnesses asked decedent if he knew what the instrument was and of he understood it, decedent responded in the affirmative. At some point, the one-page, unsigned instrument was handed to the witnesses to look at, after which the instrument was returned to the bed tray. At this juncture, decedent subscribed the instrument, which was then handed over to be signed by the witnesses. The patient representative notarized the signatures, whereupon she and the witnesses left. Decedent gave the instrument to his grandnephew to take home for temporary safekeeping.

On the next day a lawyer, whom proponent had asked to consult with decedent, visited him in the hospital, and the two discussed the possibility of a new will more reflective of decedent's wishes than the codicil that he had executed the day before. However, although decedent lived for four additional months, sometimes at home, in hospitals, or at rehabilitation facilities, he never executed another testamentary instrument.

The Law

A testamentary instrument must be executed and attested in accordance with the formalities prescribed by section 3-2.1 of the Estates, Powers and Trusts Law. To the extent presently relevant, subsection (a) of the statute provides:

> "(3) The testator shall, at some time during the ceremony ... of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has

been affixed is his will.

(4) There shall be at least two attesting witnesses, who shall ... both attest the testator's signature, as affixed ... in their presence, and at the request of the testator, sign their names ... at the end of the will."

Here, it is movant's threshold burden to make a prima facie case that the codicil was not executed in accordance with the foregoing statutory provisions. That burden would of course be heavier if the codicil contained an attestation clause (*see Matter of Schlaeger*, 74 AD3d 405, 407 [1st Dept. 2010]), which it does not, or been supervised by a lawyer (*Matter of Halpern*, 76 AD3d 429 [1st Dept. 2010], *aff'd* 16 NY3d 777]), which it was not. In other words, the presumption of compliance with the requisite formalities, available to wills with attestation clauses, and the further presumption of regularity, available to wills that are lawyer-supervised, are not factors here. In their absence, movant contends that the record as described above demonstrates that the execution here lacked two critical components: the first, publication (*i.e.*, a declaration by the testator to the two witnesses that the instrument signed by him is testamentary); the second, a request by the testator that the two individuals serve as his attesting witnesses.

Movant relies principally on the facts that decedent did not expressly declare the instrument to be his codicil (either in that word or in others denoting it) when he executed it in front of the witnesses and did not expressly ask the attesting witnesses to serve in that capacity. But neither an express declaration by decedent nor an express request by him is a sine qua non under section 3-2.1. Literal compliance with the statute is not required *(Matter of Turell*, 166 NY 330, 337). Rather, the statute can be satisfied so long as the record shows that there was "a

meeting of the minds between the testator and the attesting witnesses that the instrument they were being asked to sign as witnesses was testamentary in character" (*Matter of Roberts*, 215 AD2d 666 [2d Dept. 1995]; *Matter of Mullenhoff*, 278 AD 963 [2d Dept. 1951]). Indeed, publication can be accomplished wordlessly, whether by action or sign or implication (*Lane v Lane*, 95 NY 494). Moreover, for such purpose, the testator's understanding that the instrument in question is his will can be communicated to the witnesses, along with his wish that they serve as such, through the agency of a third person connected to the execution ceremony. Thus, "A request to sign a will made by one supervising the will execution within the hearing of the testator with his silent assent is sufficient publication" (Matter of Nelson, 141 NY 152; Matter of Hunnefleld [sic], NYLJ, September 22, 1977, p 6, col 2). Matter of Eckert, 93 Misc 2d 677, 680)" (*Matter of Miele*, NYLJ, August 28, 1997, at 1, col 1 [Sur Ct, Westchester County). *See also Matter of Buckten*, 178 AD2d 981;*lv denied* 80 NY2d 752.

However factually diverse these cases, there is a common thread that they share with one another and the present case: circumstances that per se bespeak an understanding on the part of the testator and witnesses that the instrument at hand is testamentary in nature and that their roles are, respectively, to create it and to attest to it. Such circumstances are not belied by the fact that the witnesses may fail to remember all of the details when called upon to do so some years later for purposes of a probate proceeding. For, in view of the natural "infirmities of humanity," (*Lewis v Lewis*, 11 NY 220, 224), "mere want of recollection on the part of the witnesses will not invalidate the instrument" (*id.*). A greater rigidity on the part of the courts would ignore the Court of Appeals' admonition that courts not "make the [S]tatute [of Wills] a snare instead of a protection" (*Gilbert v Knox*, 52 NY 125, 131).

The occasions on which probate has been denied on the grounds here at issue stand in sharp contrast to the present case. Thus, for example, in *Matter of Turell, supra*, individuals were asked to come to the decedent's hotel room "to witness a document"; the unidentified paper had already been signed by the time that the individuals arrived; at no point did the decedent acknowledge her signature to the purported witnesses; "and the paper was folded so that its contents could not be seen" (166 NY at 335). In other words, the *Turell* court concluded that there had been no due execution where the nature of the instrument had been purposefully concealed and there was affirmative proof of non-compliance with the statute. As another example, in *Matter of Stachiw*, NYLJ, December 2009, at 25, col 3 [Sur Ct, Dutchess County], probate was denied to a will purportedly executed by a hospital patient where, among other things, a janitor had simply been asked to stop mopping the floor long enough to "witness a patient sign something," and he had not in fact seen the patient sign anything. As yet another example, in *Matter of Sheehan*, 80 Misc 2d 793 [Sur Ct, Erie County 1975], both purported witnesses testified that the decedent had been "in an apparently 'coma-like' condition at the time that they entered her room" and that there had been no subsequent indication of any "aware[ness]" on her part "as to what was going on about her" (*id.*, at 795). Unsurprisingly, the *Sheehan* court ruled against probate.

In the present case, by contrast, decedent was clearly well aware that he was executing a testamentary instrument and that the two individuals brought to his bedside by the patient representative were there to help him in the process. Furthermore, both individuals clearly had reason to know that decedent was wittingly executing such an instrument and wished them to participate in the formalities as attesting witnesses. In other words, the record supports a

determination that there was among the three of them the "meeting of the minds" that is an essential element of due execution under section 3-2.1.

None of this is to ignore movant's suggestion that decedent did not in any event intend that the codicil take effect, despite the pains that he took to create it. Movant bases such theory on the evidence, adverted to above, that at the time decedent executed the codicil he was contemplating replacing it with an instrument more precisely tailored to his dispositive wishes. But such evidence falls completely short of the mark at which movant aims. For, even if decedent initially viewed the codicil as a stop-gap, it was nonetheless the testamentary instrument that he chose to execute and, indeed, that he never chose to revoke.

Finally, movant has suggested that the testimony of the grandnephew cannot be the source of evidence for dismissal of the objections. In support, movant cites CPLR 4519, otherwise known as the Dead Man's Statute. According to movant, the grandnephew is not competent to testify in this proceeding on the ground that proponent might be disposed to favor him with part of the residuary left to her under the codicil, as indicated by her testimony at a certain point in her deposition. But even assuming arguendo that the nephew were aware of proponent's testimony in this connection, and even further assuming arguendo that he regarded it as proverbial money in the bank, the court would ignore the nephew's own deposition testimony only if there were binding or at least persuasive authority for barring it under the Deadman's Statute in such circumstances. Movant cites no such authority, and the court's independent research has disclosed none.

In view of the foregoing, objectant's motion for summary judgment not only fails, but

also, implicates subsection (b) of section 3212 of the CPLR. The subsection provides that, "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Summary dismissal of the objections alleging lack of due execution is warranted here, even permitting objectant the benefit of every favorable inference (*see Council of City of New York v Bloomberg*, 6 NY3d 380, 401), since objectant's proofs do not raise any material question of fact that might preclude such a ruling .

Accordingly, objectant's motion for summary judgment dismissing the petition for probate is denied and movant's Objections 3, 5, and 6 are dismissed. In view of the remaining objections, a pretrial conference will be scheduled after a note of issue is filed.

This decision constitutes the order of the court.

Dated: October 10, 2012

NSA

SURROGATE