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

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Probate Proceeding, Will of

ROY L. GILMORE,

Deceased.

File No. 346747

Dec. No. 28849

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In this contested probate proceeding, the petitioner, Angela Manning, decedent's daughter, nominated executor and sole beneficiary of his estate, moves for an order pursuant to CPLR 3212 granting summary judgment admitting the proffered instrument dated June 24, 1996 to probate and dismissing the sole remaining objections filed by Andrea Hafler, a half sister of petitioner.[1]

The decedent died on January 13, 2007. He was 80 years old. This litigation has been ongoing for over 6 years and spawned several decisions by the court. Those decisions, particularly in 2010-2011, recount some of the historical perspective and in many respects factual recitations which need not be repeated here. Suffice it to say the procedural posture of the matter is that a pretrial conference went forward on September 12, 2012, and an order consented to by counsel for the parties and signed by the court on that date setting a final pretrial conference next week and the trial to be held at the end of this month [Exhibit G to the moving papers]. Additionally, that order provided that: (1) all discovery must be completed no later than March 15, 2013, and (2) all pre-trial motions must be made returnable on or before April 17, 2013. [The instant motion was made returnable and submitted May 22, 2013, 34 days late.]

Respondent's objections are the standard fare: the will was not properly executed as

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[1] Objections that had been filed by Carol Gilmore, Christina Gilmore and Roy Gilmore III to probate of the will have recently been withdrawn pursuant to a stipulation of settlement between them and petitioner dated November 27, 2012 and filed with the court late last month.

required by law; it was not freely or voluntarily made or executed by the decedent, but was procured by fraud or undue influence; decedent was incompetent to make a will and further, mirroring the settling objectants' pleading, improper incorporation.[2]

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

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[2] The opposing papers make no mention whatsoever of the incorporation issue and so the court takes this opportunity to observe that the testator's mention in ARTICLE SIXTH of the will to a post nuptial agreement with his then wife, as the reason why the instrument makes no provision for her, does not run afoul of the rule against incorporation (*See Matter of Murphy,* 70 Misc 2d 516 [Sur Ct, Kings County 1972]).

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]).

A general statement of the axioms applicable to due execution, fraud and undue influence and testamentary capacity may be stated as follows.

The proponent of a will offered for probate has the burden of proving that the instrument was properly executed. Due execution requires that the testator's signature be affixed at the end of the will in the presence of witnesses, that the testator publish to the witnesses that the instrument is his/her will, the attesting witnesses must know that the signature is that of the testator, and at least two of the attesting witnesses must attest to the testator's signature and sign their names and affix their residences within a thirty-day period (EPTL 3-2.1). The supervision of a will's execution by an attorney will give rise to an inference of due execution *(see, e.g. Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). Further, as in the case at bar, if a self-proving affidavit and attestation clause accompany the instrument they also give rise to a presumption that the statutory requirements have been met (*Matter of Farrell*, 84 AD3d 1374 [2d Dept 2011]).

The burden of proof on the separate undue influence and fraud objections lies with respondent.

In order to prove undue influence, objectant 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 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]).

To prevail upon a claim of fraud, rather than a preponderance of the evidence the higher standard of proof of clear and convincing evidence applies (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) and objectant must show 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 proponent has the burden of proving testamentary capacity. From an overall perspective on the question of 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]).

In support of her motion petitioner submits her own affidavit, that of another sister of hers, Gwendolyn Dines, as well as an affidavit of the single available attesting witness, Laward Zilk and the transcript of the SCPA 1404 examination of that witness.[3] Copies of certain discovery documents are supplied as is a copy of a bill of particulars responding to proponent's demand. Lastly it is alleged, and apparently undisputed, that objectant never met or knew decedent until in or about 2006, approximately 20 years after the will's execution, when DNA testing established their relationship.

The moving papers establish more than a prima facie showing of due execution of the proffered instrument, that the decedent had the requisite capacity to make this will, and support the conclusion that the will was neither the product of undue influence nor fraud.

The opposition to the motion consists of a 6-page affirmation by counsel for objectant with attachments primarily consisting of exchanges of written communications between counsel and his adversaries. At the risk of stating the obvious, objectant's attorney has no personal knowledge regarding the decedent, the execution of the will, etc. and his submission is an effort

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[3] As regards the two remaining attesting witnesses their testimony was dispensed with by orders of the court due to death, in one instance, and mental incapacity in the other. Further, it should be noted that the attorney draftsman predeceased the decedent.

to "poke holes" in the petitioner's motion or advance additional reasons for denial of summary judgment.

Beyond approaching the absurd, i.e. the suggestion that the attesting witness Zilk must be lying because of claimed inconsistencies or mistakes in her testimony [she signed her name 3 or 2 times during the execution ceremony], objectant's position is twofold - the fact that this motion was returnable 34 days beyond the deadline in the pretrial conference order, and thus should not be entertained at all, and the provisions of CPLR 3212 (f) are applicable at bar and the court should therefore exercise its discretion to deny the motion to permit further disclosure.[4]

While this motion was not made within the time frame fixed in the pretrial conference order, it is noted in the reply affirmation of counsel that the reason for this untimeliness was that he was out of the office for 6 weeks during the time frame at issue, one of which weeks he was in the hospital. Certainly a valid excuse for such lateness. Moreover, there is no prejudice as a result of the delay, objectant had been given several extensions of courtesy during this ligation including leave to file late objections, and if indeed there is a basis to grant relief the failure to adhere to the scheduling should not be a reason to engage in an unnecessary and protracted trial. The court will therefore consider the motion (CPLR 2001 and 2004.)

CPLR 3212 subdivision (f) vests the court with the discretion to deny a motion for summary judgment outright, or structure an alternative approach as fairness warrants, where the opposing party has not been able to obtain and marshal essential facts to defeat the application. As Professor Siegel noted, however, in the Practice Commentary: " A point worth repeating is

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[4] The opening phrase of the subdivision reads: "Should it appear [from the opposition papers] that facts essential to justify opposition may exist but cannot then be stated, ...".

the opposing party . . . . should depose in her affidavit that the needed facts do exist . . . ." (Emphasis supplied) (Siegel, Practice Commentaries, McKinney's Cons. Law of NY, Book7B, CPLRC3212:33 at 44).

As previously noted, the opposition has no affidavits by anyone with personal knowledge of anything. There are no probative exhibits supplied or referenced. There is no statement of or reference to, in Professor Siegel's verbiage, any "needed facts" that bear on the issues. Apparently neither before or after the pre-trial conference did objectant ever serve formal discovery demands. A single reference in an e-mail from objectant's counsel in December about examining petitioner, and bemoaning his own unavailability due to scheduling conflicts, never followed up by a demand or notice or written application, cannot support the position that creditable and substantial efforts at discovery were truly undertaken. There is thus no basis for application of 3212 (f) of the CPLR.

The proponent's motion for summary judgment dismissing the objections is therefore granted.

Settle decree on notice.

Dated: June 26, 2013

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