

**Matter of Testa**

2014 NY Slip Op 33068(U)

April 15, 2014

Sur Ct, Nassau County

Docket Number: 29714

Judge: Edward W. McCarty III

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

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 Probate Proceeding, Will of

File No. 2011-363722/A

ARMAND J. TESTA,  
 a/k/a ARMAND D. TESTA

Dec. No. 29714

Deceased.  
 -----x

In this contested probate proceeding, the petitioner, Rosa Bud Williams, the nominated successor executor, moves for an order pursuant to CPLR 3212 granting summary judgment admitting the proffered instrument dated November 19, 2010 to probate and dismissing the objections filed by Constance Testa, a first cousin.

The underlying facts regarding decedent, his demise, the proffered will, etc. are recited in this court's decision and order dated April 12, 2013 denying the then petitioner's motion for an order pursuant to SCPA 1410 granting dismissal of claimed untimely objections filed by Constance Testa and admitting the proffered instrument to probate. As set forth in the moving papers the original petitioner, a legatee and nominated executor under the will, Robert M. DePoto, Esq., died during the pendency of the motion above referenced and thereafter a second petition for probate was filed with the successor nominated executor as petitioner. Constance Testa again filed objections to the probate of the will alleging that: (1) it was not duly executed as required by law; (2) it was not freely or voluntarily made or executed by the decedent, but was procured by fraud or undue influence; and (3) decedent lacked testamentary capacity.

Petitioner submits a mountain of supporting exhibits including documents, affidavits and deposition transcripts in support of the motion. Objectant submits a 2-page affirmation of her counsel and a single exhibit - a copy of a letter from a physician Dr. Abrash dated July 16, 2009

which had previously been submitted in opposition to the motion on the original petition and is referenced in the court's decision.

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]).

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]).

Petitioner has made a prima facie showing of due execution and the objectant has offered nothing in opposition. The branch of the motion to dismiss the due execution objection is therefore granted.

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

In order to prove undue influence, the objectants 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]).

The objectant has failed to offer any evidence of undue influence and that objection is also dismissed.

To prevail upon a claim of fraud, rather than a mere preponderance of the evidence, the higher standard of proof of clear and convincing evidence applies (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) and objectants 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 objectant has failed to offer any evidence of fraud and that objection is also dismissed.

The petitioner 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]).

The supporting affidavits of petitioner, another life-long friend of the decedent, the testimony of the attorney draftsman, who had assisted decedent for several years prior to the preparation and execution of the will at issue, the testimony of the attesting witnesses and the sworn statements by them in the self-proving affidavits when the will was executed, that Mr. Testa was of sound mind, by presumption as well as direct proof clearly establish decedent understood the nature and extent of his property, the natural objects of his bounty and the relationship of one to the other. In short, petitioner has thus met her burden on testamentary capacity.

While the court read and tangentially considered the Abrash letter on the motion to dismiss the untimely objections, its re-submission here is useless. At the risk of stating the obvious as a copy of an unsworn letter, it is not in any evidentiary admissible format and thus not probative. Moreover, even if it was in admissible form, it is facially an expression by the decedent's doctor in some context of a disability insurance benefits claim [without any statement of what decedent was treated for and without providing the referenced attachments] of Mr.

Testa's "unemployability" and in no way raises any issue of mental faculties. <sup>1</sup> The objectant has therefore failed to raise a triable issue of fact on the issue of testamentary capacity and that objection is also dismissed.

The proponent's motion for summary judgment dismissing the objections and admitting the will to probate is therefore granted.

Settle decree on notice.

Dated: April 15, 2014

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

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<sup>1</sup>In this regard it is very telling to note the attorney for petitioner's averment at ¶ 38 of her moving affirmation that during discovery objectant's attorney was provided with letters from decedent's other doctors and HIPPA authorizations and all that was forthcoming from objectant to lay bare the proofs was the Abrash letter.