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

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Probate Proceeding, Will of

RUTH WEISSLER,

Deceased.

File No. 2014-378645

Dec. No. 30812

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In this contested probate proceeding, petitioner Ira Weissler moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the objections filed by objectants Brandon Weissler, Tristan Weissler, Logan Weissler and Cameron Weissler. The motion is opposed. For the reasons set forth below, the motion is granted in part and denied in part.

The decedent Ruth Weissler died on February 3, 2014. She was survived by Ira Weissler (son and petitioner); Robin Rader (daughter) and four grandchildren, the children of Mark Weissler, a predeceased son. The four grandchildren are the objectants herein.

The decedent's will dated June 19, 2013, which has been offered for probate, sets forth the following disposition of the residuary estate: one-third to Ira Weissler; one-third to Robin Rader; and one-third to Lauren Weissler (granddaughter, daughter of the petitioner), Brett Rader and Ethan Rader (grandchildren, children of Robin Rader). With regard to the objectants, the will sets forth: "I expressly make no provision for my grandsons Brandon, Tristan, Logan and Cameron Weissler as I am confident that my son Mark Weissler's estate has made ample financial provision for them; but I affirm herein my love and affection for each of them."

The objectants allege that the decedent was not of sound mind and memory and that the will was obtained by fraud and undue influence.

Although no objections have been made regarding due execution of the decedent's will, the court must be satisfied that the will was duly executed (SCPA 1408, *Matter of Eshagian* 54

AD3d 860, 862 [2d Dept 2008]). The requirements of due execution are set forth in Section 3-2.1 of the EPTL. In accordance with this section, every will must be in writing and executed with the following formalities. The will must be signed at the end by the testator or someone else at the testator's direction. The signature of the testator must be affixed to the will in the presence of each attesting witness or acknowledged by the testator to each witness that his signature is affixed to the will. Finally, the testator must declare that the instrument to which his signature has been affixed is his will. At least two attesting witnesses must attest to the testator's signature and, at the request of the testator, sign their names and affix their addresses.

The decedent's will was executed at the office of Patricia Goodsell, Esq. who acted as a witness along with another attorney. Both witnesses testified that the requirements of due execution were met. The proponent has made out a prima facie case of due execution.

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]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A.*

v Dino & Artie's Automatic Transmission Co., 168 AD2d 610, 610 [2d Dept 1990]). 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 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 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]).

The proponent bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them" (*id.*). As a general rule and until the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

Ms. Goodsell, the attorney who drafted the decedent's will, testified that she knew the decedent for several years and had prepared her previous will. She also testified that the petitioner was a client of hers and she knew him "slightly longer" than she knew the decedent.

She further stated that she discussed the prior will and the propounded will with the decedent. She testified that the decedent was in good shape and could discuss things clearly and intelligently. She was clear about both her family and her assets.

The objectants, in turn, allege that the decedent lacked testamentary capacity because she was not in good health and she was despondent over the suicide of her son. They have not introduced any records or other testimony which would support their claim that their grandmother lacked testamentary capacity.

Based upon the record, the court finds that Ira Weissler has met his burden of proving that the decedent possessed testamentary capacity on the dates she executed her will. Accordingly, the petitioner's motion for summary judgment on the issue of testamentary capacity is granted.

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby,* 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of Fiumara,* 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law: "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency . . . . It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge,* 70 NY 387, 394 [1877]; *see also Matter of Kumstar,* 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther,* 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]*; Matter of Burke,* 82 AD2d 260, 269 [2d Dept 1981]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28, 31 [1901]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]; *Matter of Callahan,* 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; *Matter of Elmore,* 42 AD2d 240, 241 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v. Loveridge,* 70 NY 387, 402 [1877]; *Matter of Kruszelnicki,* 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the natural objects of his affection (*Matter of Burke,* 82 AD2d 260, 273 [1981]; *see Matter of Kaufman,* 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara,* 85 AD2d 669, 671 [2d Dept 1981]).

In the instant proceeding, the petitioner and his mother lived in the same building. The attorney who prepared the decedent's will was the petitioner's attorney. The petitioner drove the decedent to see the attorney, although it should be noted that the attorney testified that the petitioner was not present during her discussions with the decedent. It is also uncontroverted

that thirteen days before the decedent executed her new will, her son, whose children were not benefitted under the new will, committed suicide. The attorney testified that much of her meeting with the decedent was spent in discussion over his suicide. It is also clear that the decedent believed that her grandchildren/the objectants would be taken care of financially by their father's estate. The objectants allege that the decedent was misinformed by the petitioner and others about their father's estate. The objectants allege that their father's estate was consumed by debt and after payment of the funeral expenses and the debt, nothing was left. As there is a question of fact regarding what information the decedent was provided with when she prepared the propounded will and whether she was knowingly provided with incorrect information which caused her to not include the objectants as beneficiaries, the petitioner's motion for summary judgment on undue influence is denied.

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of his property in a manner different from the disposition he would have made in the absence of that statement" (*Matter of Clapper,* 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). Indeed, to defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent to induce her to make

this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (NY PJI 7:60 [2006]). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]). As there is a question of what information was conveyed to the decedent which made her believe that the objectants would be financially taken care of by their father's estate, the petitioner's motion for summary judgment on the issue of fraud is denied.

For the above-stated reasons, the motion for summary judgment is granted with regard to due execution and testamentary capacity and denied with regard to fraud and undue influence.

This matter will appear on the court's conference calendar on October 14, 2015 at 9:30 a.m.

Settle decree.

Dated: September 24, 2015

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