

Matter of Mallin

2016 NY Slip Op 32032(U)

July 1, 2016

Supreme Court, Nassau County

Docket Number: 2010-360597

Judge: Margaret C. Reilly

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Probate of the Last Will
and Testament of**

HANNAH MALLIN,

Deceased,

**DECISION
AND ORDER**

**File No. 2010-360597
Dec. No. 31398**

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PRESENT: HON. MARGARET C. REILLY

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The following papers have been read on the petitioner’s counsel’s unopposed motion:

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In this proceeding, petitioner moves for an order granting summary judgment dismissing objections to probate.

Before the court is a petition for probate of an instrument, dated April 29, 2005, purporting to be the last will and testament of Hannah Mallin. Petitioner is Steven Meier. The decedent’s employee, Richard Harduwar, is the primary beneficiary of the estate under the terms of the propounded instrument.

The Attorney General represents the ultimate beneficiaries of the certain charitable bequests.

Objections to probate were filed by Gertrude Corbin, decedent's sister and sole distributee. Objections were also filed jointly by the following members of the Mallin family: Robert Mallin, Bruce Mallin, and Judith Gardenswartz. Another member of the Mallin family, Nancy Gaither, filed separate objections. The Mallin objectants are beneficiaries of a testamentary trust created under the will of Edward Mallin and would receive assets, valued at approximately \$9 million, in the event of Hannah Mallin did not exercise a power of appointment. The objections are based upon lack of due execution, lack of testamentary capacity, fraud and undue influence.

In a memorandum of law, the Mallin objectants state that they have abandoned the objection as to "direct" fraud but assert an objection based upon constructive fraud. The objections filed do not specifically mention constructive fraud. However, petitioner does not dispute that it is incorporated in the objections.

The first objection is lack of due execution. The attorney-drafter, Gary Moriwaki, is an attesting witness. The decedent was referred to Gary Moriwaki by petitioner Steven Meier, who is also an attorney. The referral was made after the decedent indicated to Mr. Meier that she intended to make a bequest of \$1 million to him in her will.

Petitioner submitted prima facie evidence that the instrument was executed pursuant to EPTL 3-2.1. A presumption of compliance with the statute arises where the execution is supervised by the attorney-drafter (*Matter of Moskoff*, 41 AD3d 481 [2d Dept 2007]; *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]) and also where, as here, the instrument contains an

attestation clause and a self-proving affidavit (*Matter of Greene*, 89 AD3d 941 [2d Dept 2011]; *Matter of Farrell*, 84 AD3d 1374 [2d Dept 2011]). The presumption is not overcome merely because the attesting witness does not specifically recall the execution ceremony (*Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]).

At their examination, neither of the attesting witnesses could recall the particulars of the execution ceremony. However, the attorney, who is highly experienced in the field of trusts and estates, testified as to his normal practice with respect to will executions (*Matter of Leach*, 3 AD3d 763 [3rd Dept 2004]).

The petitioner has made out a prima facie case for summary judgment on the issue of due execution and the objectants have failed to raise a triable issue of fact. The motion is therefore granted as to due execution.

The requirements for testamentary capacity are that the testator: 1) understood the nature and consequences of executing a will, 2) knew the nature and extent of her property, and 3) was aware of the natural objects of her bounty (*Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Templeton*, 116 AD3d 781 [2d Dept 2014]).

Testamentary capacity is not automatically ruled out in a person suffering from dementia or other illness. The requirement is that a testator is competent at the time the will is made (*Matter of Makitra*, 101 AD3d 1580 [4th Dept 2012]; *Matter of Williams*, 13 AD3d 954 [2004]). Where there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the trier of fact (*Matter*

of Kumstar, 66 NY2d 691 [1985]).

It is undisputed that in 1992 decedent was hospitalized in Metropolitan Hospital, Gracie Square Hospital, and then Silver Hill Hospital and that the diagnosis was bipolar disorder. A brain tumor was diagnosed in 1992 and another in 2009.

Petitioner has submitted the deposition testimony and affidavits of Dr. Steven Fayer in support of the motion for summary judgment. Dr. Steven Fayer was the decedent's treating psychiatrist from 1995 until her death. He states in his affidavit that he met with the decedent on the date that she executed the instrument and she was competent on that date. In his reply affidavit, Dr. Fayer states that in 2008 he first diagnosed the decedent s having "vascular dementia" and at that time she was incapable of managing her financial affairs. Dr. Fayer's notes state that the decedent displayed "manic behavior" in 1995. He explains that this does not in and of itself indicate a lack of capacity at that time. Further, Dr. Fayer states that he saw no evidence that the brain tumor affected the decedent's cognitive abilities.

Dr. Jerry Nagler, a gastroenterologist, who treated the decedent between 2002 and 2007 states in his affidavit that he noted mild memory loss in one of two examinations in 2005. In 2006 he noted increased memory loss. In 2007 he diagnosed the decedent with mild dementia.

Dr. Mitchell Raps, a neurologist, states in his expert opinion, that in all likelihood the tumor which appeared in imaging studies in 2009 would not have impaired the decedent's cognitive abilities in 2005.

In opposition to petitioner's motion for summary judgment, objectants have submitted affidavits from non-treating physicians.

Dr. Marson, a clinical neuropsychologist, states that his evaluation is hampered by the failure of Dr. Fayer to "document any psychiatric care of Mrs. Mallin between 1998 and 2006" and his failure "to create any written record of Mrs. Mallin's Alzheimer's disease symptoms, the progression of those symptoms over time, or his own treatment efforts regarding them" [aff. pp. 24,25]). Based upon Dr. Fayer's notes recorded in 1995, which state that the decedent was experiencing memory loss, had a fear of being alone and was prescribed Aricept, Dr. Marson concludes that she displayed the early signs of Alzheimer's disease at that time. He states that "the period of 1998 to 2006 corresponds to the time frame in which Mrs. Mallin's Alzheimer's Disease would have become increasingly manifest clinically" (aff. p.23) and concludes that the decedent was suffering from a modest stage of Alzheimer's dementia in April 2005.

Dr. Billik, a forensic psychiatrist, states that Dr. Fayer's performance as a physician did not meet current professional standards for "real psychiatric treatment." Dr. Billik concludes from his review of the limited records available, that the decedent's executive and cognitive functions were impaired in 2003, 2004 and 2005. However, his conclusions are based in part on speculation. For example, Dr. Billik states "in 2003 or 2004, although not documented in Dr. Fayer's medical record, pharmacy records show that he prescribed Ms. Mallin Aricept for cognitive changes (SF Tr. p.192) [or perhaps progressing dementia such

as Alzheimer’s dementia resulting from the growing untreated tumors(s) in her brain]”(aff. p.16). He further states that in 1995, the decedent “refused to take lithium because it had given her a urinary tract infection. [Any urinary tract infection would have been a very unlikely result of lithium. Rather, this appears to be an example of Ms. Mallin not recognizing her illness and not being able to think logically” (aff. p. 8). An expert may not guess or speculate in drawing a conclusion (*Rosato v 2550 Corp.*, 70 AD3d 803 [2d Dept 2010]).

Dr. Jeffrey Katz, who is board certified in neurology and vascular neurology, concludes in his affidavit that the decedent’s brain tumor recorded in 2009 would have contributed to dementia and significant cognitive impairment in prior years and possibly in the 1990s.

The attorney who supervised execution of the instrument testified that he did not review with the decedent the details of her assets. That information was supplied in writing by Steven Meier, The attorney testified that the decedent was confused as to the percentage of her estate the contemplated \$1 million bequest to Steven Meier represented and it was reduced to \$100,000. Although a testator is not required to have precise knowledge of her assets (*Matter of Vosilla*, 121 AD3d1489 [3rd Dept 2014]), the discussion concerning the bequest is relevant on the question of testamentary capacity (*Matter of Elkan*, 22 Misc 3d 1125 [A] [Sur Ct, Bronx County 2009], *aff’d* 84 AD3d 603 [1st Dept 2011]).

The testimony regarding the drafting of the instrument, coupled with the fact of her physical condition, leads to the conclusion that the objectants have submitted sufficient evidence to raise a material issue of fact as to testamentary capacity.

In order to avoid a will based upon undue influence, it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]; *Matter of Eastman*, 63 AD3d 738 [2d Dept 2009]).

Objectants contend that the burden is upon petitioner to establish that the instrument is not the product of undue influence, on the grounds that Richard Harduwar had a confidential relationship with the decedent. Richard Harduwar's testimony establishes that he acted in the capacity of a caregiver. Whether there was a confidential relationship cannot be determined on this motion. A caregiver is not in a confidential relationship as a matter of law. The existence of a confidential relationship is a determination to be made by the trier of fact (*Matter of Bonezyk v Williams*, 119 AD3d 1124 [3rd Dept 2014]).

Richard Harduwar testified to the following at his depositions. He was originally hired by the decedent in 1995 as a part-time driver and became a full-time employee in August 1995. The decedent subsequently moved from her apartment in Manhattan to the home which Richard Harduwar shared with his family in Valley Stream, New York. During the time she resided in Manhattan, the decedent attended the ballet, concerts, and museums and was involved in other social activities. Approximately a year after the decedent moved

to Valley Stream, she no longer traveled to Manhattan for these activities.

Richard Harduwar further testified that from 1998 through 2008, he assisted the decedent with her financial affairs. Richard Harduwar wrote out checks to be signed and accompanied her to visits with an accountant. He was the agent on a health care proxy which was executed in 2005. While she resided in Valley Stream, the decedent had an attendant during the day. Richard Harduwar replaced the attendant at night.

The testimony of Richard Harduwar varies as to the date the decedent moved to his home. Dr. Fayer places the date at late 2004 or early 2005. On the present state of the record, it appears likely that she resided in Valley Stream at the time of the execution of the instrument.

Richard Harduwar gives a detailed description of the assistance he gave to and activities he shared with the decedent. However, as to many transactions, no time frame is supplied or where there is a time frame, they post-date the execution of the instrument. For example, the exercise of the power of attorney, upon which the objectants rely to establish a confidential relationship as a matter of law commenced in 2008. It appears, however, that over a period of many years, Richard Harduwar accompanied the decedent to visits with relatives. They attended social functions together and traveled to Florida, Pennsylvania, Arizona and other locations.

Objectants contend that Richard Harduwar isolated the decedent from family and friends. Petitioner alleges that there were other causes for the estrangement between the

decedent and her family. There is extensive testimony concerning the family relationships. The reason for the discord will be determined by the trier of fact.

Objectants have produced sufficient evidence of the exercise of undue influence to raise a triable issue of fact and defeat petitioner's motion for summary judgment on this issue (*Matter of Katz*, 63 AD3d 836 [3d Dept 2009]). The affidavit of Dr. Billik was not relied upon in reaching this determination.

Objectants contend that the instrument offered for probate is the product of constructive fraud. It is alleged that Steven Meier intentionally withheld disclosure of the decedent's mental condition in order to effectuate a bequest of \$1 million to him which the decedent had proposed. It is not alleged that the testator was deceived, but rather that the testator's alleged mental condition was not disclosed to the draftsman.

Moreover, the objection based upon constructive fraud is premised upon the objection based upon lack of testamentary capacity. The elements of the objectant's theory of constructive fraud are that: 1) the decedent lacked testamentary capacity, 2) the information as to her capacity was intentionally withheld by petitioner, and 3) the instrument is invalid. To sustain the objection based upon constructive fraud, it is necessary to conclude that the decedent lacked testamentary capacity. A finding of lack of capacity standing alone, would require denial of probate.

Accordingly, petitioner's motion for summary judgment is granted to the extent of dismissing the objections based upon due execution and constructive fraud. The motion is denied as to the objections based upon lack of testamentary capacity and undue influence.

It is hereby

ORDERED, that petitioner's motion for summary judgment dismissing the objection based upon lack of due execution is **GRANTED**.

ORDERED, that petitioner's motion for summary judgment dismissing the objection based upon constructive fraud is **GRANTED**.

ORDERED, that petitioner's motion for summary judgment dismissing the objection based upon lack of testamentary capacity is **DENIED**.

ORDERED, that petitioner's motion for summary judgment dismissing the objection based upon undue influence is **DENIED**.

Dated: July 1, 2016
Mineola, New York

E N T E R :

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Judge of the Surrogate's Court

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