Matter of Estate of Neller
2016 NY Slip Op 33221(U)
May 23, 2016
Surrogate's Court, Richmond County
Docket Number: File No. 2011-733/B,C,D,E
Judge: Robert J. Gigante
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
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In the Matter of the Estate of

MARY NELLER, **File No. 2011-733/B,C,D,E**
a/k/a Mary C. Neller

Deceased.

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In this pending probate proceeding, a motion for summary judgment is brought by Paul P. Neller and Frances Valek (hereinafter "Objectants"), a son and daughter of the decedent. It follows the June 24, 2015 Order of the Appellate Division, Second Department that found this Court prematurely awarded summary judgment denying probate without affording the Petitioner an opportunity to meet her burden of establishing that the will was, indeed, valid. The matter was remitted to this Court and the petition for probate originally brought by Georgiana Neller (hereinafter "Petitioner"), a daughter of the decedent, was reinstated. The parties were given the time desired to complete any and all discovery in this matter, and the within motion is now properly before the Court.

Objectants seek summary judgment pursuant to CPLR 3212 and denial of probate of the subject instrument based upon the lack of due execution and the failure of the instrument to qualify as an ancient document.

Due Execution

The formal requirements for the execution and attestation of wills are set forth in EPTL § 3-2.1(a), which provides, in pertinent part, that: the will must be in writing; it shall be signed at the end thereof by the testator; the signature must be affixed in the presence of each of the attesting witnesses, or acknowledged by the testator to each

of them to have been affixed by him or her; the testator must declare to each attesting witness that the instrument is his or her will; there shall be two witnesses whose attestations shall be within a thirty (30) day period; and the witnesses must sign at the testator's request.

The burden of demonstrating that the proposed will was duly executed lies with the proponent, who must prove such by a preponderance of the evidence (Matter of Mele, 113 AD3d 858 [2d Dept. 2014]).

In the within probate, the handwritten will Dated April 25, 1989 reads as follows:

> To Whom It May Concern: In the event of my death. I want my daughter Georgianna E. Coppins. Have my house, car and all its belongings to do as she sees fit. Anyone that owes me any amount of money including herself must deduct the said amount. Only if the house is ever sold for a large amount. Then also if Georgianna does repairs or improvements, that also should be deducted. I Mary C. Neller being of sound mind do so request this order. If the house is really sold for a large amount, then I would like my Grandchildren including Paulies Jo Ann and James. All receive $100 each, also my greatgrandchildren [*sic*]. By then whats [*sic*] left can be devided [*sic*] 7 ways. I worked side by side with Dad. No one else did. God Bless all my children. I beg everyone some day speaks to each other before I die or at my wake. Always any one in need be there for each other. All my life I made up to everyone. Even Uncle John must be right never me. My brother died he did not speak to him either. Love each other always. Love & Kisses, Mom.

The two alleged witnesses to the will, who are deceased, signed a separate sheet of paper without providing printed names, addresses or a date.

Objectants correctly point out that there is a presumption of validity when an attorney supervises the execution of a will (Matter of Kindberg, 207 NY 220 [1912]). Here, the execution of the instrument was not so supervised and therefore does not enjoy the presumption of due execution.

Objectants also correctly note that attestation clauses, or self-proving affidavits, are affixed to wills pursuant to SCPA 1406 in order to give a presumption of validity to witnesses signatures, especially in situations such as this where the witnesses predecease the testator (see, Matter of Yenei, 132 AD2d 870 [3d Dept 1987]). Here, however, there is no such self-proving affidavit or affidavit of attesting witnesses and therefore no presumption of validity of the formal requirements of EPTL § 3-2.1.

Petitioner contends that the proposed will complies with the requirements of due execution "on its face" and that there are, indeed, "other facts" sufficient to prove the will.

What we know is that this will is in writing and it is signed at the end by the decedent (EPTL § 3-2.1 (a)(1); see, Matter of Winters, 302 NY 666 [1951]). The fact that a will is handwritten and not typed certainly does not prevent it from being probated (see, Matter of Lubitz, 2017 Misc33 [Surr Ct Kings Cty [1954]). However, the other formal requirements of due execution pursuant to EPTL § 3-2.1 must also be satisfied.

Here, we do not know whether the decedent signed in the presence of the witnesses, or acknowledged her signature to each of them, or declared before the witnesses that the instrument was her Last Will and Testament (EPTL § 3-2.1 (a)(2), (a)(3)).

The petitioner cites SCPA 1405(4), which addresses the present scenario where both witnesses to a will are deceased or unavailable to testify, and provides that a "will may nevertheless be admitted to probate upon proof of the handwriting of the testator and of at least one of the attesting witnesses **and such other facts as would be sufficient to prove the will**" (emphasis added).

In support of this, petitioner provided the New York State Surrogate's Court Official Form "Affidavit Proving Handwriting" to establish that she was familiar with the handwriting of the proposed testator and the two witnesses to the will. A disinterested witness, Thomas Brunn, provided affidavits proving handwriting as to the two witnesses to the will, who were his aunt and uncle.

The Court finds that the petitioner failed to prove the handwriting of the decedent, however, as the only proof submitted was from petitioner herself, clearly an interested party to this proceeding. Even assuming, arguendo, that the Court overlooked this lack of proof, the petitioner has also failed to prove any "other facts" sufficient to prove the will. The only proof provided by the petitioner is the affidavit of Thomas Brunn, who is a nephew of the two witnesses to the will and affirms that he knew the decedent for twenty-five years prior to the creation of this instrument in April 25, 1989. Mr. Brunn averred that he was told by his mother that his aunt and uncle were going to the decedent's house on April 25, 1989 to witness her will. Subsequently, the witnesses told him they signed a paper at the decedent's request.[1]

The information provided in this affidavit alone, does not establish that the formalities of due execution have been met, as it provides absolutely no proof as to whether the paper shown to the witnesses or signed by the witnesses is the instrument offered here for probate.

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[1] Mr. Brunn also affirmed that he spoke with the decedent on several occasions where she told him that she wanted her house to be left to the Petitioner and another son, William Neller. This testamentary plan conflicts with the instrument offered for probate, which leaves the house solely to the Petitioner, unless it "is really sold for a large amount," at which time the Decedent's grandchildren would receive small bequests.

Ancient Document

In some instances, the "ancient document" rule is available to relax the rigorous standards for probate where the attesting witnesses are deceased or unavailable and it is, therefore, impossible to prove their handwriting. To be admitted as an ancient document in this Court, a will must be over twenty years old, taken from a natural place of custody, and be of an unsuspicious nature (Matter of Hehn, 6 Misc2d 801 [Surr Ct Nassau Cty 1957]; Matter of Brittain, 54 Misc2d 965 [Surr Ct Queens Cty 1967]).

Here, two of the three prongs of the ancient document rule are satisfied. First, the will is over twenty years old. Second, the will was stored in the decedent's piano bench from 1989 until the petitioner retrieved it for probate, which satisfies the Court as a natural place of custody.

However the third prong of the test requiring that the will be of an unsuspicious nature is not satisfied. The plethora of case law admitting instruments to probate as ancient documents is full of references to at least one additional element that justifies the document as "unsuspicious in nature." In Matter of Price, 254 AD 477 [1st Dept. 1938], Matter of Derrick, 88 AD3d 877 [2d Dept. 2011], and Matter of Wermund, NYLJ Jul. 21, 2008, at 33, col. 4, the will contained an attestation clause. In Derrick, *supra,* and Matter of McCarthy, NYLJ, Mar 8, 2006, at 17, col 1, the will execution was attorney supervised. In Wermund, *supra,* and Pascal, NYLJ Oct. 27, 2005, at 20, col.1, the will followed a natural testamentary plan. In Giordano, the testator "adequately explained" why a third child was left out of the will, in addition to having an attestation clause.

Here, the proffered instrument does not follow a natural testamentary plan and contains many unclear statements and contingent dispositions that make the Court skeptical as to whether the decedent intended this document to be her last will and testament. Further, as discussed above, the will was neither attorney-supervised nor does it contain an attestation clause. The purpose of the ancient document rule is to relax the standards for probate where the witnesses are no longer available or deceased. The rule does not exist to probate a will that otherwise sorely lacks the requirements of due execution.

Further, the Court is charged with the obligation to be independently satisfied with the validity of the document prior to its admission to probate pursuant to SCPA 1408. Based upon the facts that the attesting witnesses are deceased, the execution of the will was not supervised by an attorney, the instrument does not contain an attestation clause, no proof that the formalities of due execution were met has been provided, and the instrument does not qualify as an ancient document, the Court is far from satisfied with the validity of the document proffered. Accordingly, the objectants' motion for summary judgment is granted and probate is denied.

The Court notes that Letters of Administration were issued herein to Paul P. Neller and Frances Valek, children of the decedent, on October 23, 2013. Those letters remain in effect and the co-fiduciaries are hereby authorized to continue to act in furtherance of concluding this estate.

This decision shall constitute the Order of the Court. Proceed accordingly.

Dated: May 23, 2016

ROBERT J. GIGANTE, Surrogate

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