| **Matter of Schmidt** |
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| 2017 NY Slip Op 31783(U) |
| August 4, 2017 |
| Surrogate's Court, Nassau County |
| Docket Number: 357862 |
| Judge: Margaret C. Reilly |
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**SURROGATE'S COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**
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**Probate Proceeding, Will of**

**DECISION**

**JOHN G. SCHMIDT,**

**File No. 357862**
**Dec. No. 32990**

**Deceased.**
**-----------------------------------------------------------------------------x**
**PRESENT: HON. MARGARET C. REILLY**

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The following papers were considered in the preparation of this decision:

Notice of Motion, Affirmation of John P. Della Ratta, Jr.;
Affidavit of Stephen C. Pinzino, Esq.; Affidavit of
Barbara M. Capone & Exhibits thereto .. . . . . . . . . . . . . . . . . . . . . . . . . . 1
Affirmation in Opposition & Exhibits thereto . . . . . . . . . . . . . . . . . . . . . . 2
Reply Affidavit to Motion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3
Last Will and Testament. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .4
Objections to Probate . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

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In this contested probate proceeding, petitioner Barbara M. Capone moves for an order granting summary judgment pursuant to CPLR § 3212 dismissing the objections filed by objectant John Schmidt, Jr. and admitting the last will and testament of John G. Schmidt dated March 24, 2009, to probate. The motion is opposed.

The decedent, John G. Schmidt, died on August 6, 2009. He was survived by a daughter, Barbara M. Capone (petitioner) and a son, John Schmidt, Jr. (objectant). The decedent's last will and testament dated March 24, 2009 was offered for probate. The proffered will names the petitioner as the sole beneficiary and executor. Article One of the proffered will sets forth the following:

> "I have intentionally declined to provide for my son, JOHN SCHMIDT, having generously provided for him during my lifetime, and I intentionally decline to provide for any children of my son, JOHN SCHMIDT, and any

and all children hereinafter born or adopted by my son JOHN SCHMIDT, and I direct that they shall take no part of my Estate."

On November 4, 2010, John Schmidt, Jr. filed objections to the probate of the decedent's will. His objections contain 39 charges which can be summarized as follows: the instrument is not the will of the decedent; the will was not duly executed; the decedent lacked capacity; the will was a product of fraud and undue influence by the petitioner; and there is a possible conflict of interest between the attorney drafter and the decedent based on the attorney's relationship with a number of different people and because the attorney drafter is nominated as the successor executor.

**Summary Judgment**

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment in contested probate proceedings is appropriate where a contestant fails to raise any issues of fact regarding execution of the will,

testamentary capacity, 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]).

**Due execution**

The proponent of a summary judgment motion must meet her burden of establishing that the purported will was duly executed (*see Matter of Rosen,* 291 AD2d 562 [2d Dept 2002]). Estates, Powers and Trust Law § 3-2.1 sets forth the following with regard to the formal execution of a will:

> "It shall be signed at the end thereof by the testator. . .The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction. . .The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which the signature has been affixed is his will. There shall be at least two attesting witnesses. . ." (EPTL § 3-2.1 [1], [2], [3], [4]).

The supervision of a will's execution by an attorney will give rise to an inference of due execution (*Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]). The presence of an attestation clause and a self-proving affidavit also gives rise to a presumption that the statutory requirements were satisfied (*Matter of Moskoff*, 41 AD3d 481, 482 [2d Dept 2007]; *Matter of Schlaeger*, 74 AD3d 405, 406 [1st Dept 2010]).

Stephen C. Pinzino, the attorney-drafter, testified that he knew the decedent for approximately 30 years as the decedent had a summer house in Jamesport where Mr. Pinzino lived. Mr. Pinzino stated he and his father, Steven D. Pinzino, who is also an

attorney, prepared two prior wills for the decedent. Mr. Pinzino also represented the decedent in the decedent's divorce proceeding in 2000. According to Mr. Pinzino, the decedent approached him and asked him to revise the decedent's prior will which he had made while still married. The decedent wanted to omit his former wife from the will as well as nominate a different successor executor as he had previously nominated his soon to be former son-in-law. Mr. Pinzino prepared the decedent's prior will, from which the objectant was excluded, as well as the March 24, 2009 will.

With regard to the execution of the will, Mr. Pinzino testified that on March 24, 2009, the day the will was executed, the decedent drove himself to the office. Present at the will execution were the following: Mr. Pinzino; Steven D. Pinzino; Michael Maura; Anthony Cueto; and the decedent. Mr. Pinzino provided the following soliloquy about the execution ceremony:

> "John [the decedent] came in. I had Michael and Anthony [attesting witnesses] there already. My father was there. I sat John at my father's desk, which is in the rear of my office, and I gave him his will, and I said, everything that we talked about is in here. I will point it out if you want me to. Read through the will. If you have any questions, let me know, and when you're done reading it, tell me. He didn't have any questions. He read through the will. He said, okay, I'm done. I said, great. I said Anthony, Michael come here . . . John was facing my father and the will was in front of him, and I said, John, this is Anthony. This is Michael. They're going to witness the execution of your will today. I said, Is this your last will and testament? He said, Yes, this is my last will and testament. I said, Is everything in here that you wanted me to change? Yes. I said, I now have you as divorced from Marie in 2002. He said, Yes, I saw that. I said, Vincent is out as the successor executor trustee and I am in. He said Yes, and I said, besides John, Jr. still being out, I have also included and made reference to Marie receives nothing and your son-in-law, soon to be ex-son-in-law receives nothing. He said, Yes, that's what I want. I said

> great. I said, This is your last will and testament? Yes. Sign your name. Make sure the witnesses see you. He signed. I turned to the witness, Did you see him sign his name? Yes. Great."

Both attesting witnesses testified that they saw the decedent sign the will and saw each other sign as witnesses. They also testified that the decedent declared that it was his will he was signing. The petitioner has established a prima facie case for due execution. The requirements of EPTL § 3-2.1 have been met.

The objectant argues that the will was not properly supervised because, although the self-proving affidavit sets forth that Stephen D. Pinzino, Steven C. Pinzino's father, supervised the execution, Stephen D. Pinzino merely "watched over" what was going on and Steven C. Pinzino supervised the execution. Any inconsistency regarding which of the attorneys present supervised the execution of the will is insufficient to overcome the presumption of due execution (*see Matter of Schlaeger*, 74 AD3d 405, 406 [1st Dept 2010]). The objectant's other arguments regarding self-interest and potential conflicts are totally without merit. Summary judgment dismissing the objection as to due execution is accordingly **GRANTED.**

**Testamentary capacity**

The proponent also has the burden of proving testamentary capacity. It is essential that a 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 natural objects of his bounty (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Less mental faculty is

required to execute a will than any other instrument (*Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from physical infirmity is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845, 847 [1979]) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). 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] [internal citations omitted]).

The medical records which were subpoenaed in this matter show that the decedent suffered from various medical ailments and was regularly treated for these ailments. On a visit to his doctor on April 13, 2009, approximately three weeks after he executed the will, the doctor's notes indicate that the decedent's judgment was intact, he was oriented to time, place and person, his memory was intact for recent and remote events, and the decedent had no appearance of anxiety, depression or agitation. Moreover, the decedent was driving independently, taking care of his own finances and his attorney stated that he had the capacity to execute a will.

The petitioner has therefore met her burden of proving that the decedent possessed testamentary capacity on the date decedent executed his will. The objectant argues that the decedent had a history of alcoholism, cirrhosis, anemia, congestive heart failure, glaucoma and diabetes. He has offered no proof whatsoever that the decedent's health

conditions in any way impeded the decedent's ability to make a will. The court, therefore, finds that there are no issues of fact as to the decedent's testamentary capacity at the time of the will's execution. Accordingly, the petitioner's motion for summary judgment dismissing the objection of lack of capacity is **GRANTED.**

**Fraud and Undue influence**

The objectant bears the burden of proof on the separate issues of fraud and undue influence (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). To prove fraud, the objectant must show by clear and convincing evidence that a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the fraudulent statement (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]).

The petitioner alleges that the decedent and objectant had a strained relationship. According to the petitioner, the objectant was often verbally abusive towards their father. The abuse, the petitioner alleges, included threatening phone calls. The decedent had two Nassau County Family Court Temporary Orders of Protection against the objectant, which the petitioner reports were violated. The petitioner also says that her brother drove to the decedent's home in Jamesport and removed property without the consent of the decedent.

The objectant acknowledges that he was angry with the decedent and that he stopped communicating altogether with his father in 2004. The objectant also

acknowledges that his father gave him a job and does not dispute the petitioner's claim that he removed items from his father's home, without consent.

The objectant argues that the decedent's will is a product of fraud because his father did not provide for him generously. The objectant posits that either the decedent believed he generously provided for his son or that the objectant "was led to believe that some of the money he had given to petitioner (or that she may have taken from him over the years) was being given by her to the objectant, when it was not which would constitute a fraud perpetrated upon Testator by Petitioner."

In order to defeat a proponent's summary judgment motion on the issue of fraud, the objectant must submit evidence, beyond conclusory allegations, that fraudulent statements were made to the decedent, that the petitioner knew they were false, and that they caused the decedent to change his will (*Matter of Eastman,* 63 AD3d 738, 740 [2d Dept 2009][internal citations omitted]). The objectant has offered nothing but conjecture to prove fraud. Therefore, the petitioner's motion for summary judgment dismissing the objection on the issue of fraud is **GRANTED.**

To prove undue influence, the 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 is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a maker fostered by the exploitation of a relationship of

trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without a showing that undue influence was actually exerted upon the decedent, mere speculation that the opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406, 407 [2d Dept 2002]).

In this case, the court finds no evidence of undue influence. Objectant implies that the petitioner had the opportunity to exert undue influence on the decedent by noting that the decedent was living with the petitioner since at least 2000 and that the decedent had given the petitioner power of attorney in December 2000. There are no allegations, however, that the power of attorney was ever used. Further, there is no evidence that the petitioner actually exerted undue influence on the decedent because, as mentioned above, Mr. Schmidt handled his own finances, was seen regularly by his doctors, and was driving independently. Moreover, according to the decedent's attorney, the decedent excluded his son in each of the three wills that the attorney prepared.

The objectant also argues that the petitioner influenced the contents of the will because Mr. Pinzino, the attorney-drafter, was handling the petitioner's divorce while he prepared the decedent's will. However, Stephen C. Pinzino explains in his affidavit that he never discussed the decedent's will with the petitioner. Moreover, he represented the decedent well before he represented the petitioner in connection with her divorce proceedings. Furthermore, the petitioner was neither present when the decedent visited Mr. Pinzino's office to review the changes to his December 5, 2000 will, nor was she

present when he signed his will on March 24, 2009. Accordingly, the petitioner's motion for summary judgment dismissing the objection of undue influence is **GRANTED.**

In conclusion, the petitioner's motion for summary judgment dismissing the objections in their entirety is **GRANTED**.

Settle decree.

Dated: August 4, 2017
Mineola, New York

**E N T E R:**

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**HON. MARGARET C. REILLY**
**Judge of the Surrogate's Court**

cc: John P. Della Ratta, Jr., Esq.
*Attorney for the Petitioner, Barbara M. Capone*
80 Glen Cove Road
Greenvale, NY 11548

Steven Greenfield
*Attorney for the Objectant, John Schmidt, Jr.*
869 Dune Road
West Hampton Dunes, NY 11978