

Matter of Freeman
2017 NY Slip Op 31784(U)
August 7, 2017
Surrogate's Court, Nassau County
Docket Number: 2016-387812
Judge: Margaret C. Reilly
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**SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

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Probate Proceeding, Estate of

THOMAS M. FREEMAN,

Deceased.

-----X

PRESENT: HON. MARGARET C. REILLY

DECISION & ORDER

File No.2016-387812

Dec. No. 32981

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

Probate Petition..	1
Waivers and Consents..	2
Notice of Motion with Exhibits.	3
Memorandum of Law in Support of Motion.	4
Affirmation of Counsel in Support of Motion.	5
Affidavits of Movants in Support of Motion.	6
Affirmation of Objectant in Support of Motion.	7
Affirmation in Opposition to Motion with Exhibits..	8
Reply Memorandum of Law in Further Support of Motion..	9
Affirmation of Counsel in Further Support of Motion..	10

In this contested probate proceeding, respondents Charles M.T. Oliver and Margaret McSharar move the court for an order permitting revocation of the waivers and consents they executed consenting to the will’s admission to probate; the motion is opposed.

The decedent Thomas M. Freeman was survived by four nieces and one nephew, the issue of his predeceased sisters, as his sole distributees. The proponent of the will is decedent’s niece Eileen Oliver. Objections were filed by decedent’s niece Suzanne Landrigan and waivers and consents were filed by Charles M.T. Oliver, Margaret McSharar, and

decedent's remaining niece, Anne-Therese Hoenig. Ms. Hoenig has not moved for permission to revoke her waiver and consent.

An application to be relieved from the effects of a waiver and consent is addressed to the discretion of the court (*Matter of Morse*, NYLJ, May 19, 1998 at 25, col 5 [Sur Ct, New York County]). Generally, a competent adult, in the absence of fraud or undue influence, is bound by the terms of a waiver and consent executed and filed in a Surrogate's Court proceeding regardless of whether or not the person was represented by an attorney at the time the waiver was executed (*Matter of Holland*, 84 Misc 2d 922, 926 [Sur Ct, Bronx County 1974], *affd* 50 AD2d 735 [1st Dept 1975]).

In the context of a probate proceeding, the courts have recognized that a consent to probate made following or simultaneously with an appearance in the proceeding is essentially a stipulation and should be treated as such and that a stricter test is applied where the motion for permission to revoke the waiver and consent is made after the will has already been admitted to probate (*Matter of Frutiger*, 29 NY2d 143, 149 [1971]). Even where, as here, the motion is made pre-decree and granting the motion would not be prejudicial to the extent that another party has already filed objections and the matter is therefore contested, it is still necessary to show the presence of "fraud, collusion, mistake, accident, or some other ground of the same nature" (*Id.* at 150). Also, even when the motion is made pre-decree, the movant must demonstrate the merits of the proposed objections and a reasonable probability of success (*id.*). Finally, where more than one party is seeking permission to revoke their

waivers and consents, each should be considered separately upon its own individual merits (*Id.* at 149, citing *Matter of Bissell*, 57 Misc 2d 220 [Sur Ct, Erie County 1968]).

Although the movants claim somewhat different bases in support of their respective motions, Margaret alleging misrepresentation and Charles undue influence on the part of the proponent in securing their respective waivers, both must fail because they have failed to demonstrate the merit of their objections and a reasonable probability of success at trial.

As to due execution, the will was prepared and its execution supervised by an attorney raising the presumption that the statutory requirements for due execution have been met (*Matter of Moskowitz*, 116 AD3d 958, 959 [2d Dept 2014]). The affidavits of the attesting witnesses further corroborate that the will was duly executed.

On the issue of testamentary capacity, neither movant makes any allegation that the testator lacked the requisite mental capacity to execute a will on the date the will was executed. The only allegation of incapacity is in the affidavit in support of the motions executed by the objectant, Suzanne Landrigan. Although she makes allegations that the testator did not recognize her on several occasions and suffered from hallucinations, these allegations are unsubstantiated, are clearly self-serving, and do not allege that the testator was hallucinating on the date of the will's execution. Allegations that the testator suffered from hallucinations without other evidence of cognitive defect is insufficient to even raise an issue of fact for trial where, as here, the testimony of the drafting attorney and the affidavits of the attesting witnesses are all in accord that the testator was in all respects competent to execute

the will offered for probate (*Matter of Butner*, 40 Misc3d 1217[A][Sur Ct, Nassau County 2013]).

There is no evidence or claim that the will was the result of a fraud having been perpetrated on the testator.

Finally, on the issue of undue influence the movants point to the fact that the testator resided with the proponent and that the drafting attorney's notes indicate that the proponent rather than the testator dictated the terms of the will. The drafting attorney's affirmation submitted in opposition to the motion makes clear that the testator was "anxious" to execute a new will that left the bulk of his estate to the proponent in the knowledge that she would take care of her mother, the testator's sole surviving sibling. The terms of the will were given to the attorney by the testator but as to the "token" pre-residuary bequests he wanted to leave to his other nieces and his nephew, the testator told the attorney he would give that more thought and that his niece, the proponent, would call the attorney the following day to provide that information. The proponent provided the information as the testator indicated would happen and the following day the will was executed in the attorney's office under his supervision.

The court finds that the movants have failed to establish the merits of their proposed objections or that those objections have a reasonable probability of success at trial.

Accordingly, the motion to permit the movants to revoke their respective waivers and consents is **DENIED**.

This decision constitutes the order of the court and no additional order need be submitted.

Dated: August 7, 2017
Mineola, New York

E N T E R :

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Judge of the Surrogate's Court

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