Matter of Fields
2018 NY Slip Op 30486(U)
March 26, 2018
Surrogate's Court, New York County
Docket Number: 2016-111
Judge: Rita M. Mella

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

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In the Matter of the Probate Proceeding, Will of

SYDNEY H. FIELDS,

Deceased.

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DECISION and ORDER
File No.: 2016-111

M E L L A, S.:

Papers Considered	Numbered
Notice of Motion, dated November 28, 2017, for Summary Judgment, With Affirmation, dated November 28, 2017, of Jules Martin Haas, Esq., in Support, Providing Exhibits A through Z and AA through FF, of which Exhibit C-3 is the Affidavit, dated November 28, 2017, of Diana Palmeri, Exhibit C-5 is the Affirmation, dated November 27, 2017, of Edward R. Curtin, Esq., Exhibit AA is the Affidavit, dated September 30, 2016, of William McAllister, Exhibit BB is the Affidavit, dated June 12, 2017, of Arthur Fishelman, Exhibit CC is the Affidavit, dated September 14, 2016, of Adrienne Lawler, Exhibit DD is the Affidavit, dated September 14, 2016, of Stuart Michael, Exhibit EE is the Affidavit, dated September 14, 2016, of Irving Rothbart, and Exhibit FF is the Affidavit, dated July 12, 2017, of Gloria Madero	1-10
Memorandum of Law, In Support of Motion	11
Affirmation, dated January 22, 2018, of Richard Chen, Esq., In Opposition, Attaching Exhibits A through P, of which Exhibit A is the Affidavit, Dated January 22, 2018, of Objectant	12-13
Reply Affirmation, dated February 23, 2018, of Jules Martin Hass, Esq., Attaching Reply Exhibits A through T	14

At the call of the calendar on March 20, 2018, the court granted proponent's motion for summary determination, dismissed the objections, and directed probate of the October 6, 2014 instrument offered as the will of decedent Sydney Fields. Objectant is the child of decedent, and he admits that he did not have a relationship with decedent and that he never saw his father for the last 19 years of his life. Moreover, objectant admits that, over the years, he sent his father correspondence and photographs that were harassing or threatening.[1]

[1]Objectant stated in opposition to this motion: "I wrote and sent harassing letters and photos to my father, and also to my half-brother . . . [who did not appear in this proceeding], and

Decedent explicitly disinherited objectant in the instrument offered for probate,[2] which, instead, benefits members of the family of decedent's spouse, who was not objectant's mother. Decedent's spouse died before him in September of 2014, which lead decedent to seek to revise his penultimate will – from 2006 – that had benefited her, but which also had disinherited objectant in terms identical to those used in the 2014 instrument. The attorney-drafter of decedent's two prior wills was also the drafter of the 2014 instrument here offered for probate, and he confirms that, despite decedent having been in his 90s, his mental faculties were intact and that it was decedent alone in a meeting who informed the attorney-drafter of who he wanted to benefit with his estate and in what percentages.

On the merits, the attestation clause in the instrument, the contemporaneous affidavit of the attesting witnesses, as well as the sworn testimony of these witnesses and the attorney-drafter, established a prima facie case for probate (*Matter of Schlaeger*, 74 AD3d 405 [1st Dept 2010]). In response, objectant failed to demonstrate, through admissible evidence, the existence of a material question of fact requiring a trial on any of the objections on which he claims probate should be denied (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). He objected that decedent lacked testamentary capacity, that the will was the product of undue influence, duress, mistake or fraud, and that it was not duly executed.

As to mental capacity, all the medical records, the affidavit of the attesting witnesses and

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Orders of Protection were issued against me and criminal charges were filed against me. I am not proud I did that" (Objectant's Affidavit in Opposition, dated January 22, 2018, ¶ 11).

[2]Article FIFTH(b) of the instrument states: "Because my son [objectant] hired a lawyer to sue me for money and because I had to have him arrested and brought to court for harassment of me and my wife, Teresa[,] I deliberately make no provision for him in this Will and it is my intention that he receive no part of my estate."

their testimony from the SCPA 1404 examinations, as well as the affidavits of several neighbors and friends confirm the lucidity and mental acuity of decedent both before and after the will execution, despite his advanced age and his having some visual impairment. No evidence submitted by objectant raises a question of whether decedent could hold in his mind the nature and extent of his assets, the identity of the natural objects of his bounty, and the consequences of executing the will, which is the traditional test for determining testamentary capacity (*Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Khazaneh*, 15 Misc 3d 515 [Sur Ct, NY County 2006]).

Regarding undue influence, proponent's proof established that this was a natural will, benefiting members of the family of decedent's spouse, with whom decedent was close and whom he considered his family. In opposition, objectant had to show, through evidence in admissible form, that the persons alleged to have unduly influenced decedent to make this will had the motive and opportunity to do so, together with some evidence, circumstantial or otherwise, indicating that undue influence was actually exercised on decedent (*Matter of Greenwald*, 47 AD3d 1036 [3d Dept 2008]). Objectant, however, provided no evidence that the will's beneficiaries had the opportunity to exercise undue influence or that they did so in light of the testimony of the attorney-drafter, which established that the beneficiaries had no direct involvement in the preparation or execution of the will (*see Matter of Camac*, 300 AD2d 11 [1st Dept 2002]).

Objectant offered no evidence of duress – a wrongful threat precluding the exercise of free will – allegedly inflicted on decedent (*Matter of Guttenplan*, 222 AD2d 255 [1st Dept 1995]), nor any evidence of mistake (*Matter of Seelig*, 302 AD2d 721 [3d Dept 2003]).

Objectant also failed to provide evidence of a misrepresentation made to decedent for the purposes of inducing him to make a will that he would not otherwise have made, as would be necessary to create a question of fact as to a fraud claim (*Matter of Schwartz*, 154 AD3d 540 [1st Dept 2017]; *Matter of Capuano*, 93 AD3d 666 [2d Dept 2012]).[3] These objections were thus dismissed.

Finally, as to the will's execution, the claimed failure of the attesting witnesses to remember all its details are insufficient to rebut the presumption of regularity in the execution of a will (*Matter of Collins*, 60 NY2d 466 [1983]). When read in its entirety, the deposition testimony of the two attesting witnesses supports the conclusion that the signature on the instrument is decedent's and that decedent executed the instrument with full awareness of what he was doing and in compliance with all statutory requirements (EPTL 3-2.1). Additionally, when the execution was supervised by an attorney and when there is a contemporaneous affidavit of the attesting witnesses reciting the facts of due execution, as is the case here, a presumption of proper execution arises (*Matter of Natale*, 158 AD3d 579 [1st Dept 2018]).[4] Here, the facts that the attesting witnesses could not confirm whether decedent had his magnifying glass that day (the attorney-drafter and one of the witnesses testified that he did) and could not provide a description

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[3]Objectant's opposition papers state that he has not had an opportunity to depose the concierge at decedent's building, who provided an affidavit in support of the motion. However, after submitting his opposition to the motion, objectant filed a note of issue and certificate of readiness with the court stating that all discovery has concluded.

[4]The fact that the attorney supervising the will execution corrected the date by hand in the text of this affidavit does not alter this analysis. Even if, for the sake of argument, it did, due execution of the will was confirmed by the testimony of the attesting witnesses and the attorney-drafter at their SCPA 1404 examinations, transcripts of which were provided in support of the motion.

of the aide who accompanied decedent to the will execution, but who appears to have stayed in a separate waiting area, were insufficient to rebut the presumption under the circumstances presented (*see id.*).

The fact that decedent had some visual impairment, even to the point of "legal" blindness as objectant argues, does not change this conclusion because blind persons may make wills (*Matter of McCabe*, 75 Misc 35, 36 [Sur Ct, NY County 1911]). Here, the attorney-drafter testified that the dispositive terms of the proposed instrument were provided to him by decedent himself and that he confirmed those dispositive provisions of the will orally to decedent shortly before execution. Moreover, the fact that the attorney-drafter had to mark the signature line at the end of the instrument with "X's," as requested by decedent, but the attorney-drafter did not mark "X's" where decedent's initials on the preceding pages of the will should be, is not suspicious (*see id.*). The last page of the will has both the signature line for the testator and signature lines for the attesting witnesses. Accordingly, the only inference that can reasonably be drawn from the fact that the attorney-drafter marked the testator's signature line with "X's" is that the testator wanted to be sure to execute the document correctly in spite of his visual impairment.

The remaining evidence on which objectant relies to support his claim that the will was not duly executed is the sworn-to "Letter of Opinion" of a claimed handwriting expert,[5] which merely concludes that "a different person authored the initials of SHF" on the first page of the

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[5]Movant contests the expertise of the person making the report, pointing to the fact that Federal courts have rejected him as an expert in handwriting. Movant cites the following cases in this regard: *Balimunkwe v Bank of Am., N.A.*, 2017 US App. Lexis 19875 (6th Cir., Jan. 17, 2017); *U.S. v Revels*, 2012 US Dist. Lexis 65069, at *22 (ED Tenn, May 9, 2012); and *Dracz v Am. Gen. Life Ins. Co.*, 426 F Supp 2d 1373, 1378-379 (MD Ga 2006).

will[6] offered for probate from the person who signed the will. This letter does not conclude that decedent's signature at the end of the will is a forgery, or even that it might be (*see Matter of Dane*, 32 AD3d 1233 [4th Dept 2006]).

Even if the court were to consider this letter an affidavit of an expert, there is no requirement that a testator initial the pages of a will for it to be valid (*see* EPTL 3-2.1[a][1]). Instead, all that is required in this regard is that it have been signed "at the end thereof" (*id.*). The opinion letter is not addressed to the real issue – whether it is decedent's signature at the end of the will – a fact that objectant does not contest with competent evidence (*Matter of Herman*, 289 AD2d 239, 239-240 [2d Dept 2001][objectant's burden is to provide particulars in order to create issue of fact on a claim of forgery]; *Matter of Taylor*, 32 Misc 3d 1277(A), 2011 NY Slip Op 51440(U), at *4 [Sur Ct, Bronx County 2011], *citing Matter of Di Scala*, 131 Misc 2d 532, 534 [Sur Ct, Westchester County 1986]; *see also Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016][expert report on collateral issue does not require denial of summary judgment]). Thus, this letter is insufficient in this instance to resist summary dismissal of the objection that the will was not duly executed (*see Matter of James*, 17 AD3d 366 [2d Dept 2005]; *see also Kopeloff v Arctic Cat, Inc.*, 84 AD3d 890, 891 [2d Dept 2011]; *Murphy v Conner*, 84 NY2d 969, 972 [1994]). Finally, objectant's surmise that, "it is possible the first two pages of the Will were exchanged for other unknown pages" after the will was executed is mere speculation, insufficient to create an issue of fact requiring a trial (*see Matter of Weltz*, 16 AD3d 428 [2d Dept 2005]).

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[6]The will is three pages long, and only a copy of the first page of the proffered will is attached to the opinion letter reporting that the initials on it are not from the person who signed the instrument at the end. No opinion is offered as to initials on its second page, and the court considers this opinion letter as addressing only the initials on the first page of the proffered will.

In examining all the evidence, the court determined that the October 6, 2014 instrument is valid and genuine and should be admitted to probate (*Collins*, 60 NY2d at 473; *see* SCPA 1408). Accordingly, the court granted proponent's motion for summary judgment, and the objections to probate were dismissed.

This decision, together with the transcript of the March 20, 2018 proceedings, constitutes the order of the court.

Settle probate decree.

Dated: March 26, 2018

SURROGATE