

**Matter of Penick**

2018 NY Slip Op 32609(U)

October 12, 2018

Surrogate's Court, New York County

Docket Number: 2016-4509/B

Judge: Rita M. Mella

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Date: October 12, 2018

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

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In the Matter of the Probate Proceeding,

DECISION AND ORDER

PATRICIA H. PENICK,

File No.: 2016-4509/B

Deceased.

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M E L L A, S.:

The following papers were considered in determining the motion for summary determination of objections to probate.

<u>Papers Considered</u>	<u>Numbered</u>
Amended Motion for Summary Judgment, Dated April 20, 2018, Dismissing the Objection[s] of Elizabeth Penick Anderson to Probate, with Affidavit, dated May 31, 2018, of proponent Earl G. Thompson, attaching Exhibits, which include the Affidavit, Dated February 16, 2018, of Frederica Clare, and the Affidavit, Dated February 22, 2018, of James O'Gara	1 - 4
Affirmation, Dated May 17, 2018, in Opposition of Daniel F. Gaven, Esq., Attaching Exhibits A through R, including the Affidavit, Dated May 17, 2018, of Elizabeth P. Anderson, the Affidavit, Dated May 17, 2018, of Gerald A. Anderson, and the Affidavit, Dated May 17, 2018, of Brendan McMahon	5 - 8
Reply Affidavit, Dated May 24, 2018, of Earl G. Thompson, in Further Support of Motion for Summary Judgment, attaching Exhibits	9

In this probate proceeding, Earl Thompson, the pro se surviving spouse of decedent Patricia Penick, moves for summary judgment to dismiss the objections filed by one of decedent's siblings to the probate of an instrument dated November 23, 2016. That instrument solely benefits proponent-movant, whereas an earlier instrument dated November 23, 2015, which has also been offered for probate, purports to disinherit her spouse and benefits decedent's siblings. Decedent's siblings, who claim that decedent was long estranged from her spouse, separately filed objections to the will offered by the spouse, but the motion requests summary determination only of the objections filed by decedent's sister. Decedent's brother, however, joins his sister in opposing the motion. The objections are as to lack of testamentary capacity and due execution and undue influence and fraud. Decedent's sister, for her part, however, conceded that capacity to execute a will was not an issue at the oral argument of this motion.

The propounded 2016 will is alleged to have been executed five days before decedent's death, while she was a resident of a care facility where she received hospice services for ALS (amyotrophic lateral sclerosis or Lou Gehrig's Disease), which took her life on November 28, 2016. This typed, one-page instrument states in its text: "I have dictated the Last Will and Testament and re-read it twice before the witnesses, who came in through a side entrance to avoid interference by my overreaching brother-in-law." A clause before the witnesses' signatures states that decedent read the will aloud twice. The signature space above decedent's typed name and the typed date contains two hand-written "x" marks alleged to have been made by decedent as her signature. The identity of the person who actually transcribed or drafted the will is not disclosed in the record on this motion. Three of the five attesting witnesses, who are alleged to be members of decedent's church, have provided affidavits or deposition testimony supporting the 2016 instrument's admission to probate. Another individual, who, it is alleged, was present in decedent's room that day, but who did not sign the 2016 instrument as an attesting witness, also has provided an affidavit in support of its probate.<sup>1</sup>

Even if proponent has established through this evidence a prima facie case for probate, the evidence provided in opposition raises material questions of fact, including the credibility of the attesting witnesses, which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Matter of Moles*, 90 AD3d 473 [1st Dept 2011] [facts and circumstances of will signing, decedent's family relations, and condition of testator's health considered as part of evidence

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<sup>1</sup>Proponent-movant's affidavit as to the facts was not considered by the court because evidence excludable pursuant to the Dead Person's Statute (CPLR 4519) cannot be used to support a grant of a summary judgment motion, but can be used to defeat such a motion (*Matter of Alden*, 52 AD2d 1051, 1051 [4th Dept 1976], citing *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]).

raising question of undue influence]; *Matter of Velasquez*, 121 AD3d 576 [1st Dept 2014]; *Matter of Jacinto*, 172 AD2d 664 [2d Dept 1991]; *Matter of Jacobs*, 251 AD2d 581 [2d Dept 1998]). While a physically impaired testator may make a mark in lieu of or as a signature that is sufficient for testamentary purposes (*Matter of McCready*, 82 Misc 2d 531 [Sur Ct, Bronx County 1975]; cf. *Matter of Grubert*, 139 AD2d 741 [2d Dept 1988]), the opposition does not focus on this issue.

Instead, the evidence in opposition directly contradicts the statements in the propounded will that decedent was able to speak and read aloud. Specifically, the Resident Services Director of the facility in which decedent resided avers that, “Based on my observations, on November 23, 2016, it would have been physically impossible for Ms. Penick to dictate this document [the propounded will] or to read it aloud even once.” This was because at that time, “[S]he [decedent] could not speak.” Objectants themselves have also provided affidavits stating that at this time decedent could not speak. This view is further buttressed by the medical records from around that time, which state that decedent was “nonverbal” and communicated only through gestures, such as “thumbs up for yes, down for no.”

The affidavit of the Resident Services Director also throws into question whether the execution even occurred in decedent’s room that day:

“The 2016 Will states that the witnesses came through a side entrance at [the residential facility]. There is a side entrance to [the facility,] which is kept locked. It can be opened from the inside, but when that door opens, an alarm sounds at the front desk. There is also a security camera at the front desk which would show who was leaving or coming in. If the person at the front desk saw somebody opening the side door and letting people in, that would have been reported. There is no report of this for November 23, 2016. Unfortunately, the security tape from November 23, 2016 is [no longer available]”  
(Ex. I, Aff. in Opposition, dated May 17, 2018, of Brendan McMahon, ¶ 7).

The central facts on which the origins and execution of the propounded will rest are the subject of disputed evidence, and summary resolution of the objections is thus inappropriate (*Matter of Chin*, NYLJ, Feb. 5, 2018, at 32 [Sur Ct, Queens County]; see *Matter of Pollock*, 64 NY2d 1156 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Accordingly, petitioner's motion for summary judgment to dismiss the objections of decedent's sister is denied. Upon the filing of a note of issue and certificate of readiness, a pre-trial conference will be scheduled with the parties, at which the trial of this matter will be scheduled.

This decision constitutes the order of the court.

Dated: October 12, 2018



SURROGATE