

Matter of Owens

2018 NY Slip Op 32751(U)

October 26, 2018

Surrogate's Court, New York County

Docket Number: 2015-3541 A

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY
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New York County Surrogate's Court

Date: October 26, 2018

In the Matter of the Estate of

MARGARET MAY OWENS,

File No. 2015-3541 A

Deceased.

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ANDERSON, S.

Decedent's former partner and sole named beneficiary ("proponent") seeks to probate a testamentary instrument dated July 7, 2008. Decedent's father and sole distributee ("objectant") opposes probate, alleging lack of due execution, lack of capacity, revocation, forgery and undue influence. Proponent now moves for summary dismissal of the objections pursuant to CPLR 3212.

Decedent died on June 19, 2015, at the age of 47, leaving an estate valued at \$1 million. It is undisputed that proponent and decedent lived together and had been in a relationship for several years until 2003, when proponent moved out of their home. The nature of their relationship after that point is disputed.

Objectant divorced decedent's mother before her death in 2007. In the propounded instrument, decedent stated: "I intentionally make no provision . . . for my father, or my half-sister [objectant's daughter from a subsequent marriage] for reasons that are well known to my father." Decedent's maternal aunt was named as the sole contingent beneficiary in the event that proponent predeceased decedent.

Legal Standard on a Motion for Summary Judgment

On a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence in admissible form to

show the absence of any disputed material facts (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Westhill Exports, Ltd v Pope*, 12 NY2d 491 [1963]). The burden then shifts to the party opposing summary judgment, who must submit evidence in admissible form demonstrating the existence of a genuine issue of material fact requiring a trial (*see Alvarez, supra*, at 324; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). Mere conclusions or unsubstantiated allegations are not sufficient to defeat a motion for summary judgment (*see Zuckerman, supra*, at 562; *William Iselin & Co. v Landau*, 71 NY2d 420, 425-26 [1988]).

Testamentary Capacity

As movant, proponent has the initial burden of coming forward with evidence that decedent had capacity to execute the propounded instrument. In order to establish capacity, proponent must show that decedent understood the nature and extent of her property and the provisions of the instrument, and her ability to identify the natural objects of her bounty (*see SCPA § 1408; Matter of Kumstar*, 66 NY2d 691, 692 [1985], *rearg denied* 67 NY2d 647 [1986]; *Matter of Wetzl*, 16 AD3d 428 [2nd Dept 2005]). The level of capacity required for the execution of a testamentary instrument is less than that required for contracts and other legal documents (*see Matter of Coddington*, 281 AD 143 [3d Dept 1952]), *affd* 307 NY 181 [1954]). The law presumes that a testator had the requisite capacity to execute a testamentary instrument (*Matter of Smith*, 180 AD 669 [2d Dept 1917]; *Matter of Maggin*, NYLJ, Sept. 7, 2016, at 22, col 3 [Sur Ct, NY County 2016]).

The record contains ample evidence of decedent's capacity. Three witnesses signed the contemporaneous self-proving affidavit annexed to the propounded instrument, in which they affirmed that decedent appeared to be of "sound and disposing mind and memory, and competent in every respect to make a [will]." The attorney-drafter testified in her SCPA § 1404

examination that decedent's conduct at the time of the execution ceremony gave her no reason to doubt decedent's testamentary capacity. Accordingly, proponent has made a prima facie case that decedent had the requisite capacity at the time she executed her will (*see Matter of Korn*, 25 AD3d 379 [1st Dept 2006]; *Matter of Clapper*, 279 AD2d 730 [3rd Dept 2001]).

The burden thus shifts to objectant to raise a genuine issue of fact as to decedent's capacity. In his affidavit in opposition, objectant avers that decedent suffered from myotonic dystrophy, a chronic disease which typically causes muscle weakness and possibly cognitive problems. Objectant also alleges that decedent was a chronic drug user in the years before and after the will was executed. He states that, after decedent's mother died, decedent "became unable to take care of her basic financial affairs." In support, he offers evidence that decedent failed to file income tax returns, deposit dividend checks, pay her bills, administer her mother's estate, and collect the proceeds of her mother's insurance policy.

For purposes of this motion, the court is obliged to view the evidence in a light most favorable to objectant, as the non-moving party (*see Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]; *Matter of Martin*, NYLJ, Oct. 26, 2015, at 26 [Sur Ct, NY County 2015]).

It is well-settled that neither illness nor use of drugs or alcohol is inconsistent with testamentary capacity (*see Matter of Reece*, NYLJ, Nov. 29, 2004, at 25, col 2 [Sur Ct, Westchester County 2001] *citing Children's Aid Soc. v Loveridge*, 70 NY 387 [1877]). In a probate proceeding, decedent's health or drug use are relevant only "to the extent that the condition may have affected [decedent's] . . . understanding of and ability to make a will at the time of its execution" (*Matter of Redington*, NYLJ, July 18, 2014, at 24, col 1 [Sur Ct, NY County 2014]). Hence, objectant cannot avoid summary dismissal of his objection of incapacity

merely by proffering evidence of decedent's use of unspecified drugs or her ill health.

Objectant's claims are vague as to time and place, and he offers no evidence that decedent's capacity was compromised by any drug use or medical condition at the time she executed the instrument (*see e.g., Matter of Redington, supra; Matter of Leiter*, NYLJ, Oct. 20, 2017, at 24, col 3 [Sur Ct, NY County 2017] [noting that evidence of drug use, without evidence of actual impairment of a testator's testamentary capacity, is insufficient to defeat a motion for summary judgment]).

Similarly, evidence that decedent mismanaged her finances do not raise a genuine issue as to whether decedent had the minimal level of capacity required to execute a will. Courts often note that only a "lucid interval of capacity" is needed in order to execute a valid will (*see Matter of Moles*, NYLJ, April 18, 2011, at 23 [Sur Ct, NY County 2011]). Even a diagnosis of dementia or alcoholism does not, in itself, create an issue of material fact as to testamentary capacity (*see Matter of MacGuigam*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County 2015] *citing Matter of Alibrandi*, 104 AD3d 1175 [4th Dept 2013]). In light of the minimal capacity required to make a valid will, the alleged instances of decedent's poor handling of her financial responsibilities can hardly be said to raise a genuine issue of fact as to her competence when she executed her will on July 7, 2008.

Objectant's only other submission in support of his objection based on incapacity is a letter dated June 9, 1992, 16 years before decedent executed the propounded instrument, purporting to be from decedent to her parents, which contains information about her assets and instructions regarding specific items, such as diaries and photographs. Attached to the letter is a one-page document, characterized in the letter as a "makeshift will," which is signed by decedent and contains a single sentence declaring that all her assets be given to her parents. Objectant

contrasts the details contained in the letter with the lack of similar details in the propounded instrument, which was drafted by an attorney and executed 16 years later, and he argues that this purported inconsistency demonstrates decedent's lack of capacity when she executed the later instrument. The absurdity of such an argument speaks for itself and warrants no further discussion.

Objectant further argues that decedent "became estranged" from proponent after proponent moved out of their home and that "[t]he very fact that [decedent] allegedly chose to bequeath her estate to her ex-boyfriend and appoint him executor raises questions about her capacity at the time." Objectant's unsupported speculation regarding decedent's relationship to proponent does not raise a genuine issue of material fact sufficient to defeat summary judgment (*see Matter of Doody*, 79 AD3d 1380-81 [3rd Dept 2010]).

Thus, the court concludes that objectant has failed to rebut proponent's prima facie showing that decedent had the requisite testamentary capacity when she executed the propounded instrument. Accordingly, the objection grounded on lack of capacity is dismissed.

Due Execution and Forgery

Proponent has the burden of making a prima facie showing that the propounded instrument was duly executed in accordance with the requirements of EPTL § 3-2.1 (*Matter of Halpern*, 76 AD3d 429, 431 [1st Dept 2010], *aff'd* 16 NY3d 777 [2011]). Where execution was supervised by an attorney, there is a presumption of compliance with such requirements (*Matter of Halpern, supra*; *Matter of Moskoff*, 41 AD3d 481, 482 [2d Dept 2007]). An attestation clause also serves as prima facie evidence that the instrument was duly executed (*Matter of Collins*, 60 NY2d 466, 471 [1983]; *Matter of Sideris*, NYLJ, Mar.14, 2016, at 28 [Sur Ct, NY County 2016]).

In their contemporaneous affidavit, the three witnesses state that decedent subscribed the instrument in their presence and declared it to be her will. They also state that the attorney-drafter supervised the execution of the instrument. Their statements are corroborated by the SCPA § 1404 examination testimony of two of the witnesses and the attorney-drafter.

The contemporaneous affidavit also serves as evidence of the genuineness of decedent's signature (*see Matter of Taylor*, NYLJ, Aug. 16, 2011, at 22, col 6 [Sur Ct, Bronx County]). The statement in the witnesses' attestation clause that "the foregoing instrument was signed . . . by Margaret M. Owens . . . in our presence. . . ." constitutes corroborating evidence that decedent's signature was not forged (*id.*). Proponent has thus made a prima facie case that the propounded instrument was duly executed in accordance with EPTL § 3-2.1.

The burden now shifts to objectant to raise a legitimate issue of fact as to whether decedent's signature was forged (*see Matter of Taylor*, NYLJ, Aug. 16, 2011, at 22, col 6 [Sur Ct, Bronx County 2011]; *Matter of Reece*, NYLJ, Nov. 29, 2004, at 25, col 2 [Sur Ct, Westchester County 2001]. Objectant must offer detailed and specific allegations substantiated by credible evidence; mere conjecture is insufficient (*Matter of Neuman*, 14 AD3d 567, 568 [2nd Dept 2005]; *Matter of Harper*, NYLJ, Nov. 14, 2014 at 36 [Sur Ct, Bronx County 2014]; *Matter of Reece*, *supra*).

In his objections, objectant alleges that the propounded instrument "is not the last will and testament of said decedent . . ." and "was not duly executed as required by law." In his responsive papers, objectant suggests that someone other than decedent may have appeared at the execution ceremony and forged decedent's signature on the last page of the instrument. He argues that the signature "does not match contemporaneous samples of [decedent's] signature," but he offers no such samples in evidence and no expert opinion in support of his forgery theory.

Nor has he offered any particulars, such as the identity or motivations of the individual who may have impersonated decedent and committed the alleged forgery (*see Matter of Herman*, 289 AD 2d 239 [2d Dept 2001] [dismissing, on a motion for summary judgment, an objection based on forgery where objectants failed to provide “the particulars of the forgery”]; *Matter of Cooney*, NYLJ, Dec. 11, 2007, at 39, col 2 [Sur Ct, Kings County 2007] [same]). The only evidence offered by objectant in support of his theory is the testimony of the attesting witnesses stating that they could not recall what decedent looked like. Objectant speculates that, given decedent’s illness, her “constant” drug use, and her custom of dressing “in an artistic, even outrageous fashion,” the witnesses, had they met her, would have remembered her.

Two of the three attesting witnesses were examined pursuant to SCPA § 1404 in March of 2016, eight years after the execution ceremony. The first witness, who was 74 years old when she was examined, testified that she suffered from memory problems and she was unable to recall much about the execution ceremony, including decedent’s appearance. The second witness also had trouble recalling much about the ceremony. However, both witnesses recognized their signatures on the instrument. The inability of the two witnesses to recall the execution ceremony does not preclude the summary dismissal of a due execution objection (*see e.g., Matter of Ruso*, 212 AD 2d 846, 847 [3rd Dept 1995] *citing Matter of Collins*, 60 NY2d 466, 473 [1983]; *Matter of Fields*, NYLJ, Apr. 2, 2018, at 25 [Sur Ct, NY County 2018]; *Matter of Bellasalmo*, NYLJ, Mar. 17, 2017, at 43 [Sur Ct, Queens County 2017]). Their failure to remember most of what transpired at the ceremony, without more, is insufficient to create a

genuine issue as to due execution. Accordingly, the objection based on lack of due execution, including the claim of forgery, is dismissed.¹

Undue Influence

To succeed on his motion, proponent has the burden of making a prima facie showing that the propounded instrument was a natural will. Affidavits submitted by proponent and decedent's maternal aunt attest to the closeness of the relationship between decedent and proponent until the time of decedent's death. As this court recently noted, it is not unusual for a testator to wish to benefit a close friend over family members (*Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County 2015]). Furthermore, the attorney-drafter and the two attesting witnesses testified that decedent was not accompanied by anyone at the execution ceremony and was not under any undue influence when she signed the instrument. In light of the foregoing evidence, the court finds that proponent has made a prima facie case that the instrument was not a product of undue influence. The burden thus shifts to objectant to proffer evidence to the contrary.

In his objections, objectant simply states that, "upon information and belief," the execution of the instrument "was obtained by undue influence," without specifying who exerted the influence or why. The elements of an objection based on undue influence are: (i) motive; (ii) opportunity; and (iii) the actual exercise of undue influence or duress over the testator (*Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Young*, NYLJ, Mar. 22, 2017 at 22, col 5 [Sur Ct, NY County 2017]; *Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County

¹ Objectant's unsupported contention that proponent's failure to produce the third attesting witness for examination pursuant to SCPA § 1404 mandates that this witness's testimony be deemed as adverse to proponent is without merit.

2015). Any objection based on undue influence is subject to the requirement that the circumstances constituting the wrongful conduct be stated in detail (*see* CPLR 3016[b]; *Matter of Young, supra*). Given objectant's failure to allege the elements of undue influence, much less offer any detailed allegations or supporting evidence, his objection is dismissed.

Revocation

Objectant bears the burden of proof on the issue of whether decedent revoked the propounded instrument (*Matter of Carcaci*, NYLJ, Mar. 12, 2002, at 17, col 1 [Sur Ct, Kings County 2002]). Since objectant offers no evidence whatsoever to support his claim that the propounded instrument was revoked by decedent during her lifetime, and since his opposition papers are silent as to this objection, it is deemed abandoned and consequently dismissed (*see generally Matter of Richmond*, NYLJ, July 19, 2017 at 28, col 3 [Sur Ct, NY County 2017] [dismissing revocation objection as having "no cognizable basis"]; *Matter of Young*, NYLJ, Mar. 22, 2017 at 22, col 5 [Sur Ct, NY County 2017] [dismissing revocation objection due to objectant's failure to address objection in his papers opposing summary judgment]).

In sum, proponent's motion for summary judgment dismissing the objections to probate is granted in full.

This decision constitutes the order of the court.

Dated:

October 24, 2018

NSA

SURROGATE