**SURROGATE'S COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**
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**Probate Proceeding, Will of** **DECISION**

**NICHOLAS DIVITTORIO,** **File No. 2014-379147/B**
**Dec. No. 34589**

**Deceased.**

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**PRESENT: HON. MARGARET C. REILLY**

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

Notice of Motion.. . . . . 1
Affirmation in Support and Exhibits . . . . . 2
Affirmation in Opposition and Exhibits . . . . . 3
Reply Affirmation and Objectant's Affirmation in Opposition. . . . . 4
Last Will and Testament . . . . . 5

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Before the court in this contested probate proceeding is a motion by Joseph DiVittorio (petitioner), which seeks the following relief: granting summary judgment pursuant to CPLR 3212 in favor of the petitioner of the instrument offered for probate and against the objectant upon the grounds that there are no triable issues of fact and no merit to the objections, thereby warranting the direction of judgment in favor of the petitioner as a matter of law; striking the objections filed by the objectant; and admitting to probate the instrument propounded to be the will of Nicholas DiVittorio, dated September 1, 2011. The motion is opposed by Nicolas DiVittorio IV (objectant).

Nicholas DiVittorio (decedent) died on February 13, 2014. He was survived by: the petitioner and five children of his predeceased son, Nicholas DiVittorio III; Christina Marie DiVittorio, Michael DiVittorio, Grace Elida DiVittorio, the objectant and Lucia Rose DiVittorio.

The decedent's will dated September 1, 2011 has been offered for probate. Article SECOND of the proffered will bequeaths the entire estate to petitioner. It further sets forth "I had a SON, NICHOLAS DIVITTORIO, PREDECEASE ME. It is my intention and desire to bequeath nothing to any issue of my predeceased son, as well as any person who may have a legal right or claim to any and all property of my PREDECEASED SON, NICHOLAS DIVITTORIO."

The objections filed on November 20, 2015 alleged the following: the purported will is not the last will and testament of the decedent; the will was not validly executed; the decedent lacked testamentary capacity; the will was procured by the undue influence of petitioner or by persons acting in concert with him; and that the purported will was procured by fraud upon the testator.

**Summary Judgment**

"[T]he 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, 323 [1986]). Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]*; see also Zuckerman v City of New York*, 49

NY2d 557 [1980]). Summary judgment in contested probate proceedings may be appropriate where a contestant fails "utterly to show any deficiency in the form of the testatrix's will" (*Matter of Posner,* 160 AD2d 943, 944 [2d Dept 1990], fails to raise a triable issue of fact with regard to testamentary capacity (*Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]), or fails to raise triable issues of fact regarding the claim of undue influence and fraud (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]).

The objectant argues that the motion must be dismissed because it is not supported by an affidavit of a person with knowledge as required by CPLR 3212 (b). However, an affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may "serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts" (*Zuckerman v City of New York,* 49 NY2d 557, 563 [1980]).

**Due Execution**

The proponent of a summary judgment motion has the burden of establishing that the purported will was duly executed (*Matter of Rosen,* 291 AD2d 562 [2d Dept 2002]). EPTL § 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 his signature has been affixed is his will. There shall be at least two attesting witnesses, who shall . . . both attest the testator's signature, as affixed or acknowledged in their presence and at the request of the

> testator, sign their names and affix their residence addresses at the end of the will." (EPTL § 3-2.1 [a] [1] [2] [3] [4]).

Where an attorney-drafter supervises the will's execution, "there is a presumption of regularity that the will was properly executed in all respects" (*Matter of Finocchio*, 270 AD2d 418, 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 Malan,* 56 AD3d 479 [2d Dept 2008]).

The attorney-drafter of the decedent's will was Charles Ferzola. The attorney-drafter was examined pursuant to SCPA § 1404. He testified that he met the decedent at some time in 2001 or 2002. Prior to 2011, Mr. Ferzola represented the decedent approximately three times. At some point in 2009, the attorney prepared a draft of an order to show cause to have the decedent's daughter-in-law, Elizabeth DiVittorio, vacate a house owned by the decedent in Port Washington. He also prepared several deeds transferring the decedent's interest in real property. The attorney never charged the decedent for his services as he considered the decedent and his son to be "like family" (Ferzola tr at 100, line 25)..

With regard to the preparation and execution of the decedent's will offered for probate, the attorney-drafter met with the decedent in the decedent's restaurant. He discussed the estate plan with the decedent but did not keep notes. His recollection was that he used a form to create the will. The attorney-drafter thought that he met with the decedent a couple of days before the will was executed where they talked

> "[a]bout how his grandchildren had disrespected him, how they had destroyed and completely ruined his house, how they wanted no part of him, how they disappeared without an address, how his daughter-in-law let his son die . . . and how he didn't want them to get anything when he was dead. And that was the conversation and not a lot else" (Ferzola tr at 125, lines 18-25; at 126, line 2).

The attorney was absolutely certain that the decedent wanted to disinherit his grandchildren. According to Mr. Ferzola, the decedent:

> "was very clear on what they did to him. I can only tell you that the house was such a disaster, it looked like a bomb had hit it. There was feces in a closet, I will never forget that. I've never seen anything like it, and he [the decedent] couldn't even bear to discuss it" (Ferzola tr at 133, lines 20-25; at 134, line 2).

Mr. Ferzola stated that, on the day of the execution of the will, he told the decedent that he was coming to the restaurant and that he needed two people to act as witnesses. He met with the decedent alone for approximately thirty minutes and they went over the will together. The attorney said that he spent the bulk of the time with the decedent reviewing the provision disinheriting his grandchildren, and that it was clear to the attorney that the decedent's intention was to not leave them anything.

The decedent's employee at the restaurant, Lorraine Silvestri, and her daughter, Lorianne Casanova, acted as witnesses. Mr. Ferzola reported that he asked the following questions of Lorraine Silvestri: her name, address, how she knew the decedent and for how long, if she knew the decedent to be "in the right frame of mind" and would she witness the decedent's signature to the will. He stated that he would have asked the same questions to both witnesses. The attorney-drafter then asked the decedent the following questions in front of the witnesses: is it your last will and testament? have you read it? do you understand it? do you have any questions? are you prepared to sign today in front of two witnesses? and is this your intent?

Attesting witness Lorraine Silvestri was also examined pursuant to SCPA § 1404.

She was an employee of the decedent's and knew him for at least 27 years. She saw the decedent sign the document in the presence of the other attesting witness, Lorianne Casanova, and Mr. Ferzola. She was certain that the decedent was competent. Ms. Silvestri stated that the decedent asked her and her daughter to act as witnesses to the will and she signed as a witness.

Lorianne Casanova, the other attesting witness, was examined pursuant to SCPA §1404. As indicated, Ms. Casanova is the daughter of Lorraine Silvestri. Her mother asked her to come to the restaurant on September 1, 2011 because the decedent needed another witness. She saw the decedent sign the will in the presence of her mother and Mr. Ferzola. She signed as a witness. She stated that she knew the decedent for approximately 29 years and would not have acted as a witness if she thought he was not competent or being forced to sign the will.

The objectant argues that the will is not validly executed because the two witnesses' signatures do not follow the attestation clause but instead are located at the end of an affidavit of subscribing witness. He further argues that because objections have been filed, the court should not consider the affidavit of subscribing witnesses. The will consists of an eight-page stapled document which is signed by the decedent at the bottom of page 6. At the top of page 7 is an attestation clause which is immediately followed by "Affidavit of Subscribing Witnesses." Page 8 consists of the end of the affidavit of subscribing witnesses and the signatures and addresses of Lorraine Silvestri and Lorianne Casanova as well as the signature of Charles Ferzola who acted as the notary public.

In similar situations, courts have found "[w]here the self-proving affidavit is attached to the rest of the instrument, it is as much a part of the will as the attestation clause and the signatures of the attesting witnesses thereon satisfy the statutory requirement that the witness sign at the end of the will. . .The statute does not require an attestation clause" (*Matter of Schmerhold,* NYLJ, April 28, 2000 at 26 col 5 [Sur Ct, Kings County [internal citations omitted]; *see also Matter of Zuracino,* 148 Misc 2d 707 [Sur Ct, Nassau County, 1990]). Although the witnesses' signatures do not directly follow the signature of the testator, the presence of the signatures at the end of the eight-page, stapled document meets the requirements of EPTL § 3-2.1.

The petitioner has established a prima facie case for due execution and the objectant has failed to raise a triable issue of fact on the issue of due execution. Summary judgment dismissing the objection as to due execution is accordingly **GRANTED**.

**Testamentary Capacity**

Although the objections provide that the decedent lacked testamentary capacity, the objectant in the affirmation in opposition "hereby withdraws with prejudice his Objections denominated "Third" [testamentary capacity] and "Fifth" [fraud] in light of the information generated during Discovery." There is no question that the decedent possessed testamentary capacity.

**Undue Influence**

The objectant bears the burden of proof on undue influence and, to prevail, "must show that the influence exercised amounted to a moral coercion, which restrained

independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist" (*Matter of Mele*, 113 AD3d 858, 860 [2d Dept 2014] [ internal quotations omitted]). Undue influence is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a testator 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" (*Matter of Chiurazzi*, 296 AD2d 406, 407 [2d Dept 2002]).

Undue influence may be proved by circumstantial evidence but the evidence must be substantial (*Matter of Walther,* 6 NY2d 49 [1959]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Callahan,* 155 AD2d 454 [2d Dept 1989]); (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Elmore,* 42 AD2d 240 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v Loveridge,* 70 NY 387 [1877]; *Matter of Chin*, 58 Misc 3d 1212 [A] [Sur Ct, Queens County 2018]); and (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]).

The objectant argues that the decedent was unduly influenced by the petitioner and/or the attorney-drafter. He argues that the decedent had a clear testamentary plan prior to 2011 that provided, if his wife predeceased him, his estate would be divided equally between his two children. He also argues that the decedent was involved in a number of transactions

which were orchestrated by the petitioner and/or Mr. Ferzola and benefitted the petitioner.

In the instant proceeding, it is undisputed that the decedent had the capacity to execute a will in 2011. The attorney who drafted the will was the decedent's long time friend and who on occasion acted as the decedent's attorney. Although the testamentary plan deviated from the prior testamentary pattern, the reason for the change is well documented. The decedent repeated to multiple people his dissatisfaction with his daughter-in-law and grandchildren. Finally, although the decedent and the petitioner appeared to have a close relationship, there is no evidence whatever that he used his position to unduly influence the decedent. For all of these reasons, the motion for summary judgment dismissing the objection of undue influence is **GRANTED**.

Accordingly, the motion granting summary judgment pursuant to CPLR § 3212 summary judgment is **GRANTED**, the objections are stricken and the decedent's last will and testament dated September 1, 2011 is admitted to probate. Letters testamentary shall issue to the petitioner.

Settle decree.

Dated: September 11, 2018
Mineola, New York

**E N T E R:**

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

cc: Mahon, Mahon, Kerins & O'Brien, LLC
Att: Richard T. Kerins, Esq.
James M. Kerins, Esq.

*Attorneys for Petitioner*
254 Nassau Boulevard
Garden City South, New York 11530

Michael F. Mongelli, Esq.
*Attorney for Objectant*
41-07 162nd Street
Flushing, New York 11358