

Estate of Beltron
2022 NY Slip Op 30579(U)
March 10, 2022
Surrogate's Court, Bronx County
Docket Number: File No. 2016-2459
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

March 10, 2022

ESTATE OF VINCENT BELTRON, Deceased
File No.: 2016-2459

In this contested probate proceeding, the petitioner and self-described “common-law wife” of the decedent, who is the nominated executor and sole beneficiary under the propounded instrument dated July 8, 2016, moves pursuant to CPLR 3212 seeking summary judgment dismissing objections to the probate of the instrument filed by decedent’s son and sole distributee, and admission of the instrument to probate. The son filed a cross-motion seeking summary judgment, denying probate of the propounded instrument on the ground of lack of due execution and opposes the petitioner’s motion, alleging that there are issues of fact in the other filed objections relating to lack of capacity, undue influence and fraud. The motion and the cross-motion were fully briefed and submitted for determination.

The decedent executed the propounded instrument while in a hospice unit at St. Barnabas Hospital and died six days later on July 14,

2016 at age 61. The five-page, typewritten instrument was witnessed by three individuals and contains an attestation clause and a purported self-proving affidavit. It is unclear whether the will was prepared by an attorney, but its execution was not attorney supervised.

In his objections regarding lack of due execution, the son alleges that the instrument was signed and drafted without attorney supervision and procured by the petitioner, the decedent was unaware that signing the instrument was a solemn legal act, and the instrument was not executed with the statutory formalities pursuant to EPTL 3-2.1. Specifically, he alleges that none of the witnesses who were purportedly present at the execution of the instrument had any memory of the decedent acknowledging that he knew what he was signing, that he even read the instrument or that the decedent declared the instrument was his last will and testament.

In addition to the allegation of lack of due execution, the son's remaining objections allege that the instrument was not freely or voluntarily made or executed and was based on fraud and undue influence, it does not reflect the true intentions of the decedent and was procured as a result of negligence, error and mistake of fact. He states that the decedent had terminal cancer with limited mental and physical capacity and alleges that the petitioner took advantage of the decedent by domineering him, isolating him from his family and everyone else who knew him, and had him sign a will while he was heavily medicated with

morphine. He further argues their “marriage” was a ruse and part of a concerted plan to improperly obtain the decedent’s assets and become his sole testamentary beneficiary. Thus, he concludes the decedent was not of sound mind or body and lacked testamentary capacity.

In support of summary judgment, the petitioner submits portions of the transcripts of the SCPA 1404 examinations of two of the three attesting witnesses, Barbara Herbst and Steven Reichert, M.D. and avers that their testimony supports that there are no issues of fact concerning due execution, testamentary capacity, and that the instrument was prepared and executed by the decedent’s free will and not procured by undue influence or fraud. She continues that the son has not presented any evidence that would create issues of fact with respect to any of his objections, and summary judgment should be granted in her favor and the propounded instrument should be admitted to probate.

One witness, Barbara Herbst, testified that she was employed as a nurse liaison at Hospice of New York for nearly thirteen years. When presented with a copy of the decedent's will, she stated she recognized the decedent's signature and acknowledged that it was signed on July 8, 2016. As to the circumstances surrounding the execution, she testified that she was in the decedent's room having a hospice conversation with him when the will was executed and that she witnessed the will signing during daytime hours. While she recalled witnessing the will signing, she could not remember who had already signed it and

although she could not recall exactly who was in the decedent's room during the will signing, she stated that she knew that the decedent and Dr. Reichert were present.

She further testified that at the time of the will signing, the decedent did not appear to be actively dying and that although the decedent appeared older than his stated age, he was conversant, alert, oriented, was pleasant and engaged, and not agitated or distracted. She testified that she was not aware if the decedent was on medication at the time of the will signing. She could not recall if the decedent declared that it was his last will and testament at the time of signing, nor did she recall seeing the decedent sign the will. She testified that all the signatories were in the decedent's room at the same time during the will signing. She testified that she would not have signed the will as a witness if she had not asked the decedent if this was what he wanted.

A second witness, Steven Reichert, M.D. ("Dr. Reichert"), testified that he has been the Director of Palliative Care at St. Barnabas Hospital since June of 2013. When shown the decedent's will, he testified that he recognized the document, that he first saw it when he signed it on July 8, 2016, that he vaguely recalled the encounter with the parties to the will signing and recorded notes in his computer about the encounter. He testified that he knew the decedent for about two weeks prior to the will signing, when the decedent was admitted for liver cancer and he was a consultant on the decedent's case just before he died. He described the

decedent's physical condition as sick, but calm and alert and stated the decedent's pain was controlled.

Dr. Reichert testified that he did not know who drafted the decedent's will, but was physically present in the room when the decedent executed the will. When asked who the other witnesses were, he testified that it was Barbara Herbst and Yin Chi and added that the decedent told him that he wanted his will completed. He further testified that he knew the petitioner to be the decedent's appointed health care proxy and nominated executor under the will, and that the decedent also executed a power of attorney at the same time of the will's execution.

While Dr. Reichert recalled witnessing both the will and the power of attorney in the decedent's hospital room, he could not recall whether the execution of the instrument occurred in the main hospital building or in the hospice wing. He also could not recall exactly who was in the room when the will was executed, but testified that Barbara Herbst and the notary public Amber Bradshaw were there, but was unsure whether Yin Chi or the petitioner Sandra Serrano were also present at that time.

Furthermore, Dr. Reichert could not recall the time of day of the will signing, was not sure if anyone was supervising its execution and stated that he, himself did not read the will before signing it. He testified that at the time of the will's execution, the decedent was calm, comfortable, in less pain, was not agitated or distracted, did not act under

any physical or mental restraint and that he was receiving morphine for his pain. Dr. Reichert continued that at the signing, he was at the decedent's bedside, the decedent recognized him in the room and that the decedent did not move about the room. He could not recall whether the decedent stated verbally that the document he was signing was his last will and testament and did not know for certain if the decedent could read in the English language. He identified his signature on the will as his own and stated that he signed the document because the decedent asked him to be a witness. He recalled witnessing Barbara Herbst signing the will, but could not recall Yin Chi signing it. He testified that the execution process took a few minutes to complete. On cross-examination, he testified that he had no doubts that the decedent knew what he was signing.

The petitioner was also deposed and testified regarding her relationship with the decedent, as she was his health care proxy and had power of attorney over his affairs while he was alive. According to her testimony, the decedent relied on her for his care and arrangements. She testified that she was present in the decedent's hospital room when the will was executed, she remembers that Dr. Reichert was in the room with two other individuals, and she saw the decedent read the will just before signing, was able to describe the decedent's hospital room in detail and that the decedent was in good spirits when he signed the will. She further testified that when signing the will, decedent was sitting up at the edge of his hospital bed and when Dr. Reichert asked him how he was feeling, he

replied “okay.” When Dr. Reichert asked him “do you know what you are signing?” he replied “yes.” She testified that when the hospice supervisor asked the decedent how he was feeling, he replied “fine.” She testified that she saw the witnesses sign the will and that the entire execution process took approximately twenty to thirty minutes.

In opposition to the petitioner’s motion and in support of his cross-motion, the son submits inter alia, the same 1404 examination transcripts of two of the attesting witnesses. He reargues the issues raised in his previous objections regarding the execution of the will and further alleges that the differing testimony of the witnesses concerning the salient points of execution shows that the document was not duly executed. Noting that although EPTL 3-2.1 (a) (3) requires the testator, at some point, to declare or “publish” to the attesting witnesses that the instrument being witnessed is the testator’s will, neither witness testified that such a declaration was made. He argues that petitioner fails to provide any evidence identifying the will’s draftsman or whether its execution was attorney supervised, averring that there is no statutory presumption of due execution, thereby raising a triable issue of fact.

In opposition to the son’s cross-motion, the petitioner avers that the will was duly executed, it contains a self-proving affidavit and that two of the attesting witnesses testified to the same. She also notes that no documents or testimony have been provided by the objectant to support his allegations that the decedent lacked capacity or that the

instrument was executed as the result of undue influence or fraud. Accordingly, she argues that there are no material issues of fact as to due execution or any of the other objections, that the court should deny the son's cross-motion for summary judgment and grant her motion for summary judgment, admitting the propounded instrument to probate.

As to his objections based on undue influence, lack of capacity and fraud, the son points to the decedent's medical issues, including his physical and mental state at the time of the will signing, and to the relationship between the petitioner and the decedent, how much control the petitioner had over the decedent during this time period, and also the fact that she had isolated him from his family. He argues that all of these factors create triable issues of fact as to decedent's capacity and whether the petitioner unduly influenced him.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movants must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movants have made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [2002]).

It is well-settled that the burden of proving that an instrument was duly executed is on the proponent who must prove “due execution” by a preponderance of the evidence (see *Matter of Falk*, 47 AD3d 21, 26 [2007], lv denied, 10 NY3d 702 [2008]). Where a will contains an attestation clause and is attorney-supervised, there is a presumption that the instrument was duly executed and is thus a valid will (see *id.*; *Matter of Pilon*, 9 AD3d 771 [2004]; *Matter of Leach*, 3 AD3d 763, 764 [2004]; see also *Matter of Paigo*, 53 AD3d 836 [2008]; *Matter of Castiglione*, 40 AD3d 1227, 1228 [2007], lv denied 9 NY3d 806 [2007]). Nonetheless, it is “incumbent upon Surrogate’s Court to examine all of the circumstances attendant to the execution of the document in order to ascertain its validity” (*Matter of Falk*, 47 AD3d at 26; see also *Matter of Collins*, 60 NY2d 466, 473 [1983]). The mere fact that the attesting witnesses either cannot recall all the details of the execution ceremony does not mean that an instrument containing an attestation clause automatically must be denied probate. Instead, it merely increases “the care and vigilance that must be exercised in examining the remaining evidence” (*Matter of Collins*

60 NY2d at 473, Matter of Shapiro, 65 AD3d 790 [2009]).

In the instant matter, the petitioner provides credible testimony regarding her account of the execution of the will. Additionally, both witnesses testify that they were both in the room together during the execution, and Dr. Reichert provides further credible testimony that the decedent told him he wanted to complete his will and asked him to be a witness. While these factors present a valid claim of a duly executed will, given the ambiguous testimony of the witnesses, the son's claims cannot be ignored. Specifically, the objectant contends that there was a lack of publication, which is fatal to due execution. Publication requires some unequivocal act by the testator to indicate to the attesting witnesses that the testator is signing a document that is testamentary in character which can be established by the conduct of the parties (see EPTL 3-2.1). In this matter, however, the witnesses provided controverted testimony relating to the issue of publication. Neither witness testified unequivocally that the decedent requested that they act as a witness to the execution of his will, nor did their testimony provide that the decedent knew the document he was signing to be his will. While Dr. Reichert testified that the decedent asked him to be a witness, there is no clear indication that this request was for the execution of the will. As testified, Dr. Reichert did not read the will, and a power of attorney was executed at the same time. More significantly, neither witness testified that they saw the decedent sign the will, although Dr. Reichert indicates he was present. Although the

witnesses to the will could not recall all of the circumstances regarding its execution, it does not automatically invalidate the instrument. Even where the memory of both attesting witnesses is failed or imperfect, a will nevertheless may be admitted to probate. However, on this state of the record, the court finds there is a triable issue of fact as to due execution and summary judgment on this issue must be denied (Shapiro, supra at 790, 791 [2009]; Matter of Falk, 47 AD3d at 21; Matter of Ruso, 212 AD2d 846 [1995]; Matter of Covo, NYLJ, May 13, 2009, at 40, col 5).

While petitioner correctly notes that less testamentary capacity is needed to execute a will than any other legal document (2 PJI3d 7:48 at 1314 [2015]) and that the crucial period of time is at the time the will was executed (*id* at 1315-1316), when reviewing the evidence in the light most favorable to the objectant, the court finds that there are triable issues of fact relating to testamentary capacity, undue influence and/or fraud. Although the witnesses believed that at the time the will was executed that the decedent was oriented, responsive and competent, it is uncontroverted that the decedent was facing a terminal illness and was being treated with morphine for pain. Neither party has provided medical records or any other compelling evidence to support their claims regarding the decedent's mental health, and there is no evidence in the record indicating a lack of lucidity or agitation of the decedent at the pertinent time. Furthermore, the will fails to mention his only son and there is no evidence indicating whether the decedent had knowledge and awareness

of the nature and extent of his property, or whether the dispositions in the will were contemplated prior to its execution.

While the petitioner argues that the witnesses' testimony gives credence and proves there was no undue influence, by petitioner's own testimony, she was the only person to read the will before its execution, and she is the only individual who observed the decedent read it. Furthermore, the son alleges that the petitioner isolated the decedent and kept him from his family and other loved ones, which the petitioner failed to defend or address. Along with being the nominated executor and sole beneficiary under the decedent's will, petitioner was also the decedent's power of attorney and healthcare proxy, thereby raising the question as to whether a confidential relationship existed between the petitioner and the decedent, and whether such relationship resulted in the petitioner having undue influence and control over the decedent at that time.

Accordingly, the court finds that there exists triable issues of fact in this matter. The summary judgment motion and the cross motion are hereby denied. The parties are directed to appear on the court's virtual platform on April 21, 2022 at 9:30 a.m. for a pretrial conference.

The Chief Clerk is to mail a copy of this decision, which constitutes the order of the court, to respective counsel for the proponent and the objectant.

Proceed accordingly.


HON. NELIDA MALAVÉ-GONZÁLEZ
SURROGATE