

Matter of Provenzano
2022 NY Slip Op 32492(U)
July 13, 2022
Surrogate's Court, Bronx County
Docket Number: File No. 2019-771
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

July 13 , 2022

ESTATE OF IRENE PROVENZANO, Deceased
File No.: 2019-771

In this contested estate, Salvatore Provenzano (“Salvatore”), the decedent’s son, who filed a petition seeking to probate a handwritten one-page instrument dated August 24, 2018 (“the propounded instrument:), moves for summary judgment pursuant to CPLR 3212 dismissing the objections with a jury demand filed by another son, Anthony Provenzano (“Anthony”). After Anthony filed opposition to the motion, Salvatore filed a reply and the matter was marked “submitted for determination.”

The decedent died from cancer on October 26, 2018 at the age of seventy-one (71). In addition to the two sons, her only other distributee is a daughter from a previous marriage that ended in divorce. The decedent was predeceased by her second spouse, the sons’ father. The propounded instrument was signed by the decedent while she was receiving impatient chemotherapy at Hackensack University Medical Center (Hackensack Hospital) in New Jersey. The decedent’s signature on the instrument is not dated and is next to that of a New Jersey notary indicating that “the

instrument was notarized on August 24, 2018.” Two Hackensack Hospital nurses, whose addresses do not appear on the instrument, signed their names below a typewritten sentence stating that “the witnesses below have found Irene Provenzano to be of sound mind and free will at the time this instrument was signed.” The instrument does not name an executor. After one dollar bequests to Anthony and the daughter, “Sal Provenzano (my son) will inherit the house and all contents, assets with it, including safety deposit and checking account, stocks and bonds [and] all vehicles.” Both witnesses subsequently executed SCPA 1406 affidavits.

According to the probate petition, the estate assets consist of \$132,000 in personal property and realty valued at \$750,000. Temporary letters of administration subject to SCPA restrictions concerning the realty issued to Salvatore upon his filing a bond in the penal sum of \$132,000. Anthony and the daughter jointly served and filed objections to the propounded instrument, and thereafter the daughter withdrew the objections filed on her behalf. Anthony’s remaining objections assert, inter alia, lack of due execution, lack of testamentary capacity and that the instrument was produced by fraud and undue influence. Pursuant to an order dated May 23, 2022 the SCPA 805 (3) restrictions were lifted, and an additional bond in the sum of \$999,999 was directed and filed.

The decedent executed a power of attorney in favor of Anthony at Hackensack Hospital on August 2, 2018 and was readmitted on August 17, 2018 for chemotherapy for end stage lymphoma. Her prior will dated

March 24, 2006 (“the 2006 instrument”) was attorney supervised with a self-proving affidavit. The second spouse was the nominated executor and sole testamentary beneficiary, a friend is nominated as successor executor, Salvatore is an alternate successor executor and the two sons are equal contingent beneficiaries.

IN SUPPORT OF SUMMARY JUDGMENT

Salvatore asserts that the propounded instrument was properly executed, it satisfies all of the requirements of EPTL 3-1.2 and all of Anthony’s objections are baseless. In addition to the two attesting witnesses and a notary, the decedent’s two best friends were present at the time that the decedent executed the propounded instrument on August 24, 2018. Salvatore also avers that the propounded instrument reflects the decedent’s well-considered testamentary plan to disinherit the daughter and Anthony because her relationship with them had deteriorated over the course of many years. In further support, he annexes complete transcripts of the SCPA 1404 examinations of his testimony, along with that of the two witnesses, the two friends and Desmond Lyons, Esq., an attorney who drafted an unsigned codicil to the 2006 instrument shortly before the decedent’s death.

THE SCPA 1404 EXAMINATION TESTIMONY

One witness, Ann Klobus, R.N. (“Nurse Klobus”), testified that she cared for the decedent at Hackensack Hospital on August 24, 2018. At that time, in the course of performing her professional duties, she observed

that the decedent was quiet, very alert but weakened, and appeared calm. She also testified that Kaitlyn Molinaro Ross, R. N. (“Nurse Molinaro”), the decedent’s primary nurse for the next shift, requested that she stay on to witness the decedent sign a will. Nurse Klobus recalled witnessing a will only one other time and remarked that it appeared “strange” that there was a one dollar bequest, but not that the will was handwritten, and a gentlemen whom she identified as “an attorney” was also present.

The second witness, Kaitlin Molinaro, R. N. (“Nurse Molinaro”), testified that she was not aware of the other gentlemen’s credentials and this was the only time that she witnessed a will. Although she recalled that the decedent remained her hospital bed during the will signing and that she signed the paper as a witness, Nurse Molinaro could not remember who asked her to act as such.

Clementine Cillo (“Ms. Cillo”) testified that her friendship with the decedent spanned over 52 years, they got together three or four times weekly, spoke daily and “shared everything including each other’s joys and sorrows.” She recounted that Anthony was a difficult teenager who gave his parents a hard time and would not listen to them and after an incident where it was alleged that Anthony stole cash and jewelry, a confrontation ensued with his parents, after which Anthony left their house and never lived with them again. She also testified that the decedent and the spouse stated to her on numerous occasions that they were hurt and embarrassed by an outburst from Anthony that occurred at his wedding, that Anthony and the

daughter were disrespectful and only came around when they needed money, and they would accordingly “get nothing when we died.” As her health was failing, the decedent reiterated to this witness that she needed to draft a new will so that Anthony and the daughter would only get one dollar.

Ms. Cillo continues that Rosa, the other friend present at the will signing, was formerly employed by an attorney in the Bronx. At the recommendation of that attorney, Rosa called a mobile notary to come to Hackensack Hospital, who Ms. Cillo paid in cash. At the decedent’s request, Rosa asked two nurses on the hospital floor to act as witnesses, and both agreed to serve. Ms. Cillo testified that the decedent was also aware that the mobile notary would be present when she signed the will. She noted that Salvatore was not at the hospital during the will signing and, in fact, did not know that it was taking place. After the will was signed, the decedent reminded the witness daily that she was not to inform Anthony and the daughter that their mother was ill, and that she did not want them at her funeral. Ms. Cillo concludes that she was at the decedent’s bedside when she died, and that the decedent had never met or even saw photos of any of her grandchildren.

The other friend, Rosa Calandriello (“Rosa”), testified that she was acquainted with the decedent for over 20 years and saw her three to four times weekly. A former EMT, she drove the decedent to chemotherapy, medical scans and doctors’ appointments, became the decedent’s primary care giver and was the decedent’s health care proxy. Rosa never met

Anthony and saw the daughter for the first time at the decedent's funeral. The witness continued that the decedent was distressed that she never met her grandchildren and continued to declare that "Anthony and Gina were only to get one dollar each." After being discharged from Hackensack Hospital, the decedent indicated that she needed to see an estate attorney, but she was readmitted and the attorney "was not able to come to New Jersey." Accordingly, the decedent asked the two friends to secure witnesses and a notary to help her memorialize her wishes in a handwritten will. Rosa concludes that the decedent drafted and signed the one-page will in front of the two friends, the two nurses and the notary, and Salvatore was not present.

Desmond Lyons ("Lyons"), an attorney with experience in trusts and estates matters, testified that the decedent was referred to him in early 2018 by the spouse of her former attorney who was deceased. Their first meeting was on March 1, 2018. At that time, the decedent came to his office by herself, appeared to be mobile and gave him a copy of the 2006 instrument. She stated that she wanted to revise the document because her husband had died, and she wanted to remove one of her sons and her daughter from the will because the son had stolen money and jewelry and was estranged from her for eight years. She spoke favorably of her other son, Salvatore, who was a police officer, and she wanted to make sure that he inherited all of her assets at her death. When the decedent was at Hackensack Hospital, Lyons informed her that he was unwilling to come to

New Jersey and that they would resume their discussions when she returned to New York. He states that he had no prior relationship with Salvatore and only met him once.

Lyons further testified that after the decedent was discharged from Hackensack Hospital and transferred to a facility in New York, he drafted a four-page first codicil to the 2006 instrument and presented the decedent with a copy at the Dumont Rehabilitation Center in New Rochelle on October 10, 2018. At that time, the decedent appeared “fit of mind, physically failing, but sharp in her mind” and reiterated her estrangement from Anthony and the daughter. Accordingly, Lyons proposed that “we add some additional language” and he would return with a revised document that would be “properly executed and not rely on the handwritten will that she made in New Jersey.” Although he did not think that the handwritten instrument was invalid, it would be “better to have a more formal codicil drafted. . . to avoid a proceeding like this.” However, the decedent was transferred to an intensive care unit at Albert Einstein Hospital and the codicil was not signed.

Salvatore testified that his relationship with the sister improved after the decedent’s death and is now “very good.” In contrast, the sister’s and Anthony’s relationship with the decedent was poor, and his relationship with Anthony remains “nonexistent.” Salvatore maintains that he had a good relationship with the decedent, who suffered from lymphoma for over five years prior to her death. Salvatore concludes that he was under the

impression that the New Jersey power of attorney in his favor which the decedent executed at Hackensack Hospital was inoperative in New York and the decedent was in charge of her own finances until her death.

OPPOSITION ASSERTED BY ANTHONY

Anthony concedes that the decedent never spoke to him after she wrongly accused him of stealing comic book art, even after her home surveillance system identified another person as the culprit and the art was recovered by the New York City police. He contends that beginning in January, 2018, when the decedent was in a weakened physical and mental state from cancer, Salvatore procured a power of attorney enabling him to control all of the decedent's assets and financial affairs and never informed Anthony when the decedent was hospitalized or how sick she was. He asserts that Salvatore misused a confidential relationship to coerce the decedent to change her 2006 will in which the two sons were equal beneficiaries and paid Lyons to revise the will in his sole favor. He opines that the daughter was not included in the decedent's estate planning because she already owned a house and was going to inherit her own father's estate.

Anthony's attorney annexes portions of transcripts of the SCPA 1404 examinations and treatment notes of Hackensack Hospital personnel concerning the decedent in support of the contention that the decedent was in a poor physical and mental condition in the weeks proximate to the will signing. Counsel notes the hospital record of August

22, 2018, two days before the will was signed, indicates that the decedent had an acute respiratory failure resulting in reduced blood oxygen level that required a “response team.” He continues that the nurse’s records of August 23, 2018 and August 24, 2018 indicate that the decedent required assistance with feeding, cutting up foods and opening items on her food tray, and other hospital records report low blood pressure, impaired vision, a chest tube and administration of a blood transfusion, and the testimony of the two nurses demonstrates that the decedent was weak, and neutropenic, with a very low white blood count at the time that the will was signed.

Anthony’s attorney emphasizes that the letter of engagement addressed to the decedent by Lyons was sent to Salvatore at his home address. Counsel urges that the circumstances of execution of the handwritten August 24, 2018 instrument are “murky,” as the will does not contain an attestation clause, does not nominate a fiduciary, has no interrorem clause and there are no contingent beneficiaries. He opines that the testimony of the two nurses, the two friends and the notary, who were all allegedly present at the time the will was signed, is inconsistent. One nurse testified that she was not sure whether there were four or five people present and suggested that one of the decedent’s friends asked her to be a witness, and both nurses seemed uncertain whether the decedent wrote out the handwritten will in their presence. Counsel also notes that the instrument does not specify the financial accounts or safe deposit box that are referenced, and that, after the decedent closed her safe deposit box at TD

bank, she had a personal safe at her house, and there is no indication that she understood that her assets exceeded \$1,000,000. Counsel reiterate's Anthony's allegations that Salvatore isolated the decedent from the two other children, who were unaware that the decedent was seriously ill, and, although Salvatore was not physically present at the signing of the propounded instrument, he misused a confidential relationship to procure it.

SALVATORE'S REPLY

In further support of due execution, Salvatore's attorney replies that the attesting witnesses, who were experienced registered nurses taking care of the decedent at the time the will was executed, recalled that the decedent signed her will in their presence and other persons were also in the hospital room at the time. They also testified that they would not have acted as attesting witnesses if they had not been satisfied that the decedent was mentally competent and found her to be quiet but alert. The decedent's two friends, who were also present in the room, also testified that the decedent was alert and aware at that time. The attorney concludes that the formal requirements of will execution and attestation by the witnesses as set forth in EPTL 3-2.1 were satisfied, in pertinent part, that

“(A) Except for noncupative and holographic wills authorized by 3-2.2 every will must be in writing, and executed and attested in the following manner:

1. The instrument shall be signed at the end by the testator;
2. The testator must sign the will in the presence of each of the attesting witnesses;
3. The testator, at some time during the

ceremony of execution, shall declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will;

4. At least two attesting witnesses, within thirty days, shall both attest the testator's signature, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. . . . The failure of a witness to affix his address shall not affect the validity of the will....

(b) The procedure for the execution and attestation of wills need not be followed in the precise order set forth in paragraph (a) so long as all the requisite formalities are observed during a period of time in which, satisfactorily to the Surrogate, the ceremony or ceremonies of execution and attestation continue.”

PREDICATE FOR SUMMARY JUDGMENT

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 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 [1st Dept 2002]).

In a contested probate proceeding, summary judgment is appropriate where a petitioner establishes a prima facie case for probate and the objectant fails to raise a triable issue of fact concerning the viability of the will (see *Matter of Moskowitz*, 116 AD3d 958 [2d Dept 2014]; *Matter of Sabatelli*, 161 AD3d 872 [2nd Dept 2018]). The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with statutory requirements (see EPTL 3-2.1 [a]; *Matter of Schmidt*, 194 AD3d 723 [2nd Dept 2021]; *Matter of Bux*, NYLJ, Dec. 17, 2021 at 17, col 12 [Sur Ct, Bronx County 2021]). The proponent must also establish that the decedent understood the nature and consequences of making the will, the nature and extent of his or her property, and the natural objects of his or her bounty (see *Matter of Kumstar*, 66 NY2d 691, 692 [1985], *Matter of Falkowsky*, 197 AD3d 1300 [2d Dept. 2021]; *Matter of Bux*, NYLJ, Dec. 17, 2021 at 17).

The objectant bears the burden of establishing that the will was procured as a result of undue influence exercised over the decedent (see *Matter of Nurse*, 160 AD3d 745 [2nd Dept. 2018]). To establish undue influence, facts must be sufficiently set forth to show that the influencing party had a motive to influence, and that such influence was actually exercised (see *Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Fellows*,

16AD3d 995 [3rd Dept. 2005]). In order to demonstrate the existence of a confidential relationship, there must be evidence of circumstances that demonstrate inequality or a controlling influence (see Matter of Burrows, 203 AD3d 1699 [4th Dept 2022]; Matter of Nurse, 160 AD3d at 745). Where the existence of a confidential relationship is established, the burden shifts to the beneficiary to show that the transaction is fair and free from undue influence (see Matter of Albert, 137 AD3d 1266 [2nd Dept 2016]; Matter of Bartel, 161 Misc 2d 455, 458 [Sur Ct, NY County], aff'd sub nom. Cordovi v Karnbad, 214 AD2d 476 [1st Dept 1995]). Mere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact (see Matter of Ryan, 34 AD3d 212 [1st Dept 2006], lv denied 8 NY3d 804 [2007]); Matter of Coniglio, 242 AD2d 901 [2nd Dept. 1997]).

The objectant likewise has the burden of proof on the issue of fraud and must demonstrate, by clear and convincing evidence, that fraudulent statements were made to the decedent, the proponent knew they were false, and that they caused the decedent to change her will (see Matter of Eastman, 63 AD3d 738 [2nd Dept. 2009]; Matter of Gross, 24 AD2d 333, 334 [2nd Dept. 1997]).T

DUE EXECUTION

Although execution of the handwritten instrument was not attorney supervised and there is no self-proving affidavit, it contains a basic attestation clause signed by two witnesses who were nurses caring for the

decedent and who thereafter executed SCPA 1406 affidavits that the will was properly executed (see Matter of Collins, 60 NY2d 466 [Matter of West, NYLJ, Aug. 10, 2015 at 28 [Sur Ct, NY County 2015]). There is no requirement that the provisions in the document be read aloud (see EPTL 3-3.21 [a] [3]; Matter of Hedges, 100 AD2d 586 [3rd Dept 1984]; appeal dismissed 63 NY2d 944 [1984]; Matter of Lubin, NYLJ, Mar. 18, 2011 at 27 [Sur Ct, Bronx County 2011]). The SCPA 1404 testimony establishes that the decedent requested the two friends to obtain witnesses to her signing the instrument, the two nurses acted as such and the decedent tacitly acknowledged that they were there in that capacity. The proponent has met his burden concerning due execution.

TESTAMENTARY CAPACITY

Salvatore's attorney urges that Anthony's opposition concerning the decedent's medical condition and capacity is solely based on the review and interpretation of certain Hackensack Hospital records by his attorney, who does not qualify as a medical expert and never treated the decedent. Nonetheless, the notes of the Hackensack Hospital physicians and nurses who cared for the decedent, that Anthony submits in opposition indicating the decedent had shortness of breath on August 17, 2018, also state that "the patient is awake, oriented and cooperative, although seems somewhat depressed." On August 22, 2018 entries in the decedent's hospital chart by several physicians and nurses state, in pertinent part: "no neurological deficit; normal interaction; converses fluently and clearly;"

“appeared in mild respiratory distress, awake and oriented, cooperative, although seems somewhat depressed;” and “shortness of breath, in bed, alert and oriented has no complaints of chest pain and states she feels fine at this time.” On August 23, 2018, a dietician reports “Patient frail with very poor appetite, has good comprehension anticipate fair compliance...” On August 24, 2018, the date the instrument was signed, Nurse Ross, one of the attesting witnesses, states that the decedent is “resting quietly in bed visitors at bedside, blood transfusion.”

It is undisputed that the decedent was suffering from end stage lymphoma on the date that she signed the propounded instrument. However, there is nothing in the hospital records or SCPA 1404 examination transcripts submitted by both sons indicating that she was lethargic, sedated, unaware of her surroundings or lacked understanding or capacity. The instrument conveys to Salvatore what the decedent accurately believes to be her estate, principally consisting of realty, bank accounts, stocks, bonds and motor vehicles. At all relevant times, the decedent consistently indicated that although she had three children, Salvatore was the primary object of her bounty. There is no indication that the decedent lacked testamentary capacity at any of the relevant times. Thus, the proponent has met his burden concerning testamentary capacity.

UNDUE INFLUENCE AND FRAUD

Although Anthony recounts a tumultuous, dysfunctional relationship with his family, it is undisputed that he did not speak with or visit the

decedent for at least nine months prior to her death, allegedly because of missing comic book art, and never permitted the decedent to meet her grandchildren. He ascribes the lack of contact to the decedent's not returning his phone calls, and not visiting her because "she was so sick and he did not think he could just show up unannounced."

The decedent's two friends, who testified that they were her primary care givers during her lengthy battle with cancer, confirmed the lack of contact with Anthony and the daughter, and that they had numerous lengthy conversations with the decedent concerning her desire to disinherit them for this. Because she wanted to memorialize the disinheritance while she was hospitalized, the decedent asked one of the friends to summon a notary who was to be paid by the other friend. Attorney Lyons' handwritten notes from his initial meeting with the decedent on March 1, 2018 and his affirmation supplementing his deposition testimony corroborate that the delay between the initial consultation and the signing of an engagement letter with his firm was that the decedent was undergoing treatment for cancer at various facilities in New York and New Jersey. Accordingly, the decedent requested that the letter of engagement was to be addressed to her in care of Salvatore, who was to bring it to her to be signed. Lyons also testified that the decedent consistently reiterated her intent to disinherit Anthony and Gina, and that she was aware of the objects of her bounty, her children, and the value of her estate, and thus he had no concerns regarding her competency to execute the estate documents. "To me, her mental health

was, she was fit mentally, very sharp and very strong willed.” He also confirmed that the proponent was not present at their conferences and that the decedent was referred to him by the spouse of her former attorney who had died.

There is nothing in the record indicating that Salvatore prevented Anthony from visiting or communicating with the decedent or had anything to do with the decedent’s decision to change her testamentary plan. Salvatore did not introduce Attorney Lyons to the decedent, attend the will signing or procure the witnesses or notary. There is likewise no indication that Salvatore misused a confidential relationship, controlled the decedent’s financial affairs or used the power of attorney, given his testimony that he believed the New Jersey document was inoperative in New York.

The decedent’s two friends corroborated that Ms. Cillo, who held the decedent’s health care proxy, was the decedent’s primary caretaker when she was not hospitalized, and the decedent was hospitalized and cared for by Hackensack staff at the time the handwritten will was signed. There is no evidence of a confidential relationship, that the decedent was dependent on Salvatore in any of her day to day affairs during the relevant times, or that Salvatore retained or paid Lyons for his legal services or directed him to change the decedent’s estate plan. The submissions, including the transcripts of the SCPA 1404 testimony of multiple disinterested witnesses, establish that the decedent wanted to change her 2006 will because, inter alia, she was estranged from two of her children, who

effectively ignored her when she was terminally ill, she never met her grandchildren, and she wanted to solely benefit Salvatore. The objectant has not met his burden concerning undue influence and there is no showing whatsoever of fraud.

CONCLUSION

On this state of the record, mere speculation cannot serve as a substitute for proof (see *Matter of Eastman*, 63 AD3d 728, 740 [2nd Dept. 2009]; *Matter of Martin*, NYLJ, Oct. 26 at 26 [Sur Ct, N Y County 2015]), and the objectant fails to raise any material issue of fact regarding undue influence based on a confidential relationship, fraud, or any other ground, in the preparation or execution of the will (see *Matter of Dorris*, 2022 N.Y. App. Div. LEXIS 3378 [1st Dept 2022]; *Matter of Ryan*, 34 AD3d 212, 215 [1st Dept 2006]; *lv denied* 8 NY3d 804 [2007]; *Matter of Bartel*, 214 AD2d 476, 477 [1st Dept 1995]).

Based upon the evidence submitted, the court finds that the will dated August 24, 2018 was executed in accordance with the statutory formalities at a time when the testator had testamentary capacity and was not under restraint (see EPTL 3-1.1; SCPA 1408). Accordingly, this decision constitutes the order of the court granting Salvatore's motion for summary judgment in all respects and dismissing the objections filed by Anthony.

Letters of administration c.t.a. shall issue to Salvatore upon his filing a bond in the total penal sum of \$1,132,000. The letters of temporary administration that issued to him are to be revoked in the decree to be entered hereon.

The Chief Clerk shall mail a copy of this decision and order to counsel for the parties.

Submit decree.

Enter:

HON. NELIDA MALAVE-GONZALEZ