

Matter of Estate of Passaro

2024 NY Slip Op 34656(U)

May 14, 2024

Surrogate's Court, Richmond County

Docket Number: File No. 2019-375/A/B/C

Judge: Matthew J. Titone

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This opinion is uncorrected and not selected for official publication.

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

-----x
In the Matter of the Estate of

MICHAEL PASSARO,

**File No. 2019-375/A/B/C
DECISION AFTER TRIAL**

Deceased.
-----x

The following papers number 1 to 7 were considered by the court,¹

	Paper Numbered
Objection to the Probate by Respondent (dated September 30, 2021)	1
Note of Issue (dated January 20, 2023)	2
Order Framing Issues (dated October 26, 2023)	3
Petitioner's Exhibit and Witness List (dated November 9, 2023)	4
Respondent's Exhibit and Witness List (dated November 9, 2023)	5
Trial Transcript (dated November 15, 2023 and November 20, 2023)	6
Objectant's Post Trial Memorandum (dated December 27, 2023)	7

In the above referenced sub-proceeding "B", Camille Flagiello, appearing self-represented, (hereinafter "petitioner"), filed a petition for letters testamentary on February 2, 2021, seeking probate of the decedent's purported Last Will and Testament dated February 4, 2019 (hereinafter "Will"). Respondent, Daria Cucciarre (hereinafter "respondent"), decedent's sister and intestate distributee, through counsel, filed objections to probate dated September 4, 2021.

¹ Petitioner's post-trial submission was not in proper form and not considered by the court in this decision.

On January 20, 2023, respondent filed a Note of Issue and Certificate of Readiness for trial and demanded a trial by jury on all issues. Thereafter, respondent filed an Order Framing Issues, listing the following issues of fact:

- (1) Did Michael Passaro subscribe papers offered for probate, dated February 4, 2019 at the end thereof, in the presence of at least two attesting witnesses, or acknowledge to at least two attesting witnesses that the subscription appearing on such papers had been made by him?
- (2) At the time of making the subscription or acknowledgment, did Michael Passaro declare to at least two attesting witnesses that the papers offered for probate were his Last Will and Testament?
- (3) Did at least two attesting witnesses subscribe their names at the end of the papers offered for probate in each other's presence and in the presence of the decedent?
- (4) Was the execution of the written instrument caused or procured by the exercise of undue influence?
- (5) Was the execution of the instrument offered for probate cause or procured by fraud?
- (6) Did Michael Passaro lack the requisite mental capacity to execute the written instrument, dated February 4, 2019, offered for probate as his Last Will and Testament?

On October 2, 2023, respondent filed a withdrawal of the jury demand and petitioner and respondent filed their respective witness and exhibit lists. Petitioner's witness list named: Delvis Valdes, Mario Valdes, Michele Como, and Daria Cucciarre. Respondent's witness list named: Elena Cucciarre, Camille Flagiello, Anthony Feline, Delvis Valdes, Mario Valdes, and the Clove Lake Records Administrator. The Clove Lakes Healthcare and Rehabilitation Center medical records were stipulated into evidence. A trial was held on November 15 and 20, 2023. Of those listed above, the court heard testimony from Delvis Valdes, Mario Valdes, Michele Como, Daria Cucciarre on behalf of petitioner, and the court also heard testimony from Elena Cucciarre on behalf of respondent.

The purported Will dated February 4, 2019, devised sixty (60%) percent interest of decedent's fifty (50%) percent interest in real property located at Pouch Terrace Staten Island,

NY (hereinafter “Pouch property”) to his “friend and neighbor,” petitioner Camille Flagiello. The purported Will also bequeath “any and all monies” to petitioner and wished to name petitioner as the new beneficiary of his then existing life insurance policy. Further, there was a specific devise of twenty (20%) percent of decedent’s fifty (50%) percent interest in the Pouch property to Anthony Feline. Decedent also specifically devised to Feline his sit-down lawnmower, snowblower and skid of rock salt.

Additionally, twenty (20%) percent of decedent’s fifty (50%) percent interest in the above referenced real property was devised to his niece Antonia Falcone, as well as all of his remaining personal possessions, including three marble statues. Decedent also devised all of his deceased wife’s personal belongings to his sister-in-law Dotie Tracy.

Lastly, decedent specifically made no provision for his sister Daria Cucciarre and her daughter Elena Cucciarre, as Daria Cucciarre was already a fifty (50%) percent owner of the Pouch property.

Findings of Fact

On November 15, 2023, petitioner called her first witness, attorney-draftsman Delvis Valdes (hereinafter the “attorney-draftsman”). During direct examination, the attorney-draftsman testified that the decedent contacted him to draft his Will, that the signature on the purported Will was the signature of the decedent, and that the decedent signed the purported Will in front of him. Tri Tr 11:2-8. Additionally, the attorney-draftsman testified that he was a witness to the Will, and his signature is present as one of the witnesses. Tri Tr 11:9-10. Further, he testified that the decedent was “normal” the day he signed the purported Will. Tri Tr 7:15-16.

The attorney-draftsman also testified that “the decedent knew who he was at the time he drafted the Will and that the decedent called upon him to do the Will.” Tri Tr 7:2-6.²

On cross examination, the attorney-draftsman testified that his primary area of practice is real estate law and that he does not generally practice in the area of trusts and estates. Tri Tr 14:14-16 15:2-4. He also testified that when he visited decedent in the nursing home, the decedent requested the attorney-draftsman to draft a Will for him. Tri Tr 16:11-15. Upon the attorney-draftsman being questioned by respondent whether petitioner was present at the nursing home during these conversations, he testified, “I don’t recall her even being there. If I said at the time she was there, then she was probably there. I wouldn’t discuss the matter of a will with someone who is not giving me the will, who I am not doing the will for. If she was there, I would have asked her to please give us a few minutes and then I would have discussed the matter with Mr. Passaro.” Tri Tr 30:4-10.

The attorney-draftsman further testified on cross examination, that decedent did not tell him to write “fee simple interest” in the Will, but that the attorney-draftsman did it of his own volition. Tri Tr 34:11-19. Moreover, the attorney-draftsman testified that the decedent wished to give petitioner “any and all monies remaining in my bank account.” Tri Tr 35:10-16. Respondent then questioned the attorney-draftsman on the statement contained within the will as such, “I wish to name Camille Flagiello as my new beneficiary of my existing life insurance policy.” Respondent questioned whether the attorney-draftsman was aware that a beneficiary of a life insurance policy may not be changed by a will, to which he testified, “he did and informed decedent that such a change should be made directly with any relevant financial or insurance institutions.” Tri Tr 36:15-24 and 37:1-2. Respondent further questioned the reasoning behind

² At the end of petitioner’s direct examination of Valdes, respondent moved for a directed verdict Tri Tr 12:19-25 13:1-17. Such motion was denied with leave to renew.

specific bequests in the Will of a lawnmower, snow blower, and skid of rock salt to Feline in the Will. Respondent asked if decedent told the attorney-draftsman to indicate in the Will, "I do this bequest in recognition of the care and concern that was exhibited towards me and my beloved wife, Barbara, over the years." To which the attorney-draftsman testified that decedent told him he wanted to give Anthony Feline something because "he was always around since Anthony Feline was a kid." Tri Tr 38:1-13. Further, the attorney-draftsman testified that he was paid by check for drafting the Will and received the check from petitioner after having already spoken with the decedent. Tri Tr 43:2-3 45:11-20. Valdes also testified that petitioner was paying the decedent's bills at the time, and the check was written from the decedent's bank account. Tri Tr 44:1-11. The attorney-draftsman also testified that he was unaware of who specifically signed the decedent's name on the check. Id.

On redirect, the attorney-draftsman stated he witnessed decedent sign his Will. On recross, he also testified that he read the Will from beginning to end to the decedent, and that when he asked the decedent if the Will contained his testamentary wishes, the decedent replied, "Yes." Tri Tr 64:1-9. The attorney-draftsman further testified that he signed as a witness, after the decedent signed, and attorney-draftsman's brother, Mario Valdes, also signed as a witness. Tri Tr 68:4-5.

On direct examination, Mario Valdes (hereinafter "Mario"), testified that he witnessed the decedent execute the purported Will and that the decedent was coherent. Mario also testified that the decedent was in the "right frame of mind" as they had a short conversation prior to the Will's execution. Tri Tr 85:22-24. Mario also testified that his brother, the attorney-draftsman, explained the terms of the Will and read the Will to the decedent. Tri Tr 86:23-25 87:1-3.

Thereafter, Michele Como was called as a witness on behalf of petitioner, who was then cross examined by counsel to respondent, without import. Decedent's sister, respondent Daria Cucciarre, was then called as a witness on behalf of petitioner. Daria testified that petitioner took care of the decedent. Tri Tr 6:3-4. Elena Cucciarre (a/k/a Eleanor Cucciarre), the decedent's niece, was then called as a witness on behalf of respondent. Elena testified that the last time she visited the decedent was in November 2018, prior to the decedent's death in February 2019. Tri Tr 12:9-14.

Relevant Law

On October 4, 2021, respondent filed objections to the Will alleging lack of due execution, lack of capacity, and that the written instrument was not freely and voluntarily executed but was the product of fraud and/or duress, coercion, and undue influence.³

A proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements (EPTL 3-2.1[a]; Matter of Sundmacher, 192 AD3d 898 [2d Dept 2021]). The proponent of a will has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether the testator understood the nature and consequences of executing a will; (2) whether the testator knew the nature and extent of the property being disposing of; and (3) whether the testator knew those who would be considered the natural objects of testator's bounty (Matter of Martinico, 177 AD3d 882 [2d Dept 2019]).

“Less capacity is required to enable one to make a will than to make other contracts” (Matter of Coddington, 281 AD 143 [3d Dept 1952], affd 307 NY 181 [1954]). Testamentary capacity need only be shown at the time the will was executed (see Matter of Anella, 88 AD3d

³ The Order Framing Issues did not request a specific query regarding the claims of duress or coercion, apart from the general prompt regarding fraud.

993, 995 [2d Dept 2011]; Matter of Wetz, 16 AD3d 428 [2d Dept 2005]; Matter of Rosen, 291 AD2d 562, 562 [2002]), and “[it] has long been recognized that old age, physical weakness and senile dementia are not necessarily inconsistent with testamentary capacity as long as the testat[or] was acting rationally and intelligently at the time the instrument was prepared and executed” (Matter of Hedges, 100 AD2d 586, 588 [1984]; see Matter of Giaquinto, 164 AD3d 1527, 1529 [2018], affd 32 NY3d 1180 [2019]; Matter of Romano, 137 AD3d 922, 923 [2d Dept 2016]).

Where the Will is drafted by an attorney, and the drafting attorney supervises the Will’s execution, there is a presumption of regularity that the will was properly executed in all respects (Matter of Armato, 199 AD3d 999 [2d Dept 2021]; Matter of Sabatelli, 161 A.D. 3d 872 (2d Dept 2018)).

The mere making of a Will creates a presumption against intestacy (In re Manning’s Will, 234 N.Y.S. 109 [Surr. Ct. Albany Co. 1929], affd. 227 App.Div. 644, affd. 252 N.Y. 540). Provided that a propounded last will and testament is admitted to probate, it is axiomatic that the intent of the testator was to dispose of their estate under the Will (Fulton Trust Co. of New York v. Phillips, 218 N.Y. 513 [1916]; In re McGowan’s Will, 235 N.Y.S. 484 [Surr. Ct. Kings Co. 1929]; In re Potter’s Estate, 231 NYS 355 [Surr. Ct. Oneida Co. 1928]).

It is the primary objective of the court, when there is a finding that the Will was duly executed, to ensure that the testator’s intent is honored (Matter of Fischer, 804 N.Y.S.2d 863 [2005]; SCPA 1408[2]; 41 N.Y. Jur. 2d, Decedent's Estates § 1627).

The burden of proof on the issues of fraud, undue influence, and duress, falls on the objectant (Simcuski v. Saeli, 44 NY2d 442 [1978]). “To prevail upon the claim of fraud,

objectant was obligated to prove, by clear and convincing evidence, that petitioner knowingly made false statements to the testator” (Matter of Gross, 242 AD2d 333 [2d Dept 1997]).

Further, to vitiate a will on the ground of undue influence, it must be shown that the influence exercised amounted to a moral coercion, “which restrained independent action and destroyed free agency, or which, by importunity, 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 Engelhardt, 88 AD3d 997, 998 [2d Dept 2011]).

Conclusions of Law

At trial, Valdes testified that he drafted the Will in accordance with decedent’s wishes. Valdes testified that he may have added inconsequential language and attributed that to his limited practice in the area of trusts and estates. He further testified that petitioner was not present for conversations regarding the Will, or any initial conversations regarding decedent’s wishes, or during the execution. Further, he testified that he read the Will to decedent, supervised the execution of the Will, and witnessed the Will.

While petitioner did not elicit the factors of due execution during direct examination, she did elicit the fact that the purported Will was attorney drafted and that the attorney was present for the execution ceremony. As discussed *supra*, when there is a duly executed Will before the court, there is reason for this court to find that the decedent did not intend to leave their estate to the laws of intestacy. (In re Manning’s Will, *supra*) Therefore, this court allows the testimonial evidence elicited on direct, cross, and re-direct examination to satisfy the petitioner’s burden of proof.

Respondent on the other hand did not overcome the inference of due execution established by the testimony of the attorney-draftsman, who supervised the execution ceremony.

Nor did Respondent establish that petitioner was physically present, and/or exerted influence over the decedent. The mere testimony from the attorney-draftsman stating that his payment by check from the decedent's bank account, handed to him by petitioner, is not enough to establish that petitioner exerted influence over the decedent. Similarly, the language in the purported will regarding a "fee simple interest" was explained by the attorney-draftsman to have been inserted by him, as he is a real estate attorney and wanted to explain the property interest in that manner. Such language is inconsequential and does not establish fraud or undue influence by the petitioner.

Additionally, the purported will makes specific reference to the personal and real property of the decedent, down to his ownership percentage of the real property. The purported will also unambiguously make no provisions for his sister Daria Cucciarre or his niece Elena Cucciarre,⁴ as Daria Cucciarre is already fifty (50%) percent owner of the Pouch property, showing that the decedent knew the natural objects of his bounty and the nature and extent of the estate's property.

Therefore, respondent did not satisfy the burden of proof on the issue of fraud or undue influence. Furthermore, there was no medical evidence nor expert testimony to rebut the presumption showing decedent was competent at the time the Will was executed.

Conclusion

Petitioner has met her burden to prove the purported Will was executed with all statutory formalities and that the testator had the requisite capacity to execute a Will. Accordingly, the instrument dated February 4, 2019, is admitted to probate as decedent's Last Will and Testament.

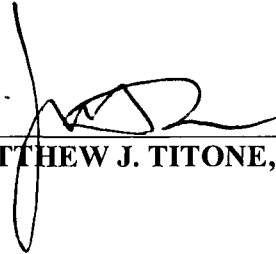
⁴ Named in decedent's Will as "Daria Cucciarre" and "Eleanor Cucciarre."

Letters Testamentary shall issue to Camille Flagiello pursuant to Article SEVENTH of the Will.

Moreover, sub-proceedings "A" and "C" are dismissed as moot.

Decree signed.

Dated: May 14, 2024

A handwritten signature in black ink, appearing to read "MATTHEW J. TITONE", written over a horizontal line.

MATTHEW J. TITONE, Surrogate