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

----------x

Probate Proceeding, Will of ALEXANDER SCHURE, Deceased.

File No. 358887

Dec. No. 28303

----------x

In this contested probate proceeding, the petitioner, decedent's second wife Gail Schure, moves for an order pursuant to CPLR 3212 granting summary judgment admitting the proffered instrument dated December 21, 2005 to probate and dismissing the objections filed by three of the four of decedent's children from his first marriage, Louis Schure, Jonathan Schure and Barbara Weinschel.

The decedent died on October 29, 2009. He was 89 years old. Decedent and petitioner were married on September 12, 1984. An instrument purported to be decedent's last will and testament, dated as aforesaid, and naming the petitioner as the executor, has been submitted for probate. The propounded instrument leaves the decedent's entire estate to the petitioner as his surviving spouse and, unless she predeceases them, makes no provision for the respondents. An earlier will dated March 29, 1994, left decedent's entire estate to objectants.

Respondents have filed objections to probate alleging that: (1) the alleged will was not duly executed as required by law; (2) the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by fraud or undue influence practiced upon the decedent by the petitioner or others acting in concert with her; and (3) on the date of the making of the instrument, decedent was not was not of sound mind or memory and thus incompetent to make a will.

Summary judgment may be granted only when it is clear that no triable issue of fact exists

(*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]; *Zarr v Riccio*, 180 AD2d 734, 735 [2d Dept 1992]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Hantz v Fishman,* 155 AD2d 415, 416 [2d Dept 1989]).

If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In doing so, the party opposing the motion must lay bare his or her proof (*see Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Prudential Home Mtge. Co., Inc. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding testamentary capacity, execution of the will, undue influence or fraud (*see e.g. Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]).

The proponent of a will offered for probate has the burden of proving that the instrument was properly executed. Due execution requires that the testator's signature be affixed at the end of the will in the presence of witnesses, that the testator publish to the witnesses that the instrument is his/her will, the attesting witnesses must know that the signature is that of the testator, and at least two of the attesting witnesses must attest to the testator's signature and sign their names and affix their residences within a thirty-day period (EPTL 3-2.1). The supervision of a will's execution by an attorney will give rise to an inference of due execution *(see, e.g., Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). Further, as in the case at bar, if a self-proving affidavit and attestation clause accompany the instrument they also give rise to a presumption that the statutory requirements have been met (*Matter of Farrell*, 84 AD3d 1374 [2d Dept 2011]).

Objectants erroneously rely on two typographical or scrivener's errors in execution in an effort to defeat summary judgment on this objection. The dates of the proffered instrument and the self-proving affidavit are not the same, the will being dated December 21st and the affidavit December 19th, and the latter has a gender error referring to the decedent as "she" and/or "her." Two attorneys, a partner and an associate at Rivkin Radler, LLP, both engaged in the trusts and estates area, the former who supervised the execution of the instrument and the latter who prepared the will as well as served as one of the attesting witnesses, have given sworn testimony of the errors as to the December 19th date in the affidavit and the gender pronouns.

While these are mistakes, under such circumstances, they certainly do not rise to the level of manifesting genuine issues of fact as to due execution (*See Matter of Nettleton*, NYLJ, Jan. 17, 1995, at 29, col 6 [Sur Ct, Nassau County]). Accordingly, summary judgment is granted and

that objection is dismissed as a matter of law.

The burden of proof on the separate undue influence and fraud objections lies with respondents.

In order to prove undue influence, the objectants must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*Matter of Walther,* 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions, Civil, 7:55). It is seldom practiced openly, but it is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]).

Accusations by objectants abound against petitioner and the Rivkin Radler, LLP attorneys on the claim of undue influence. Mrs. Schure is accused of systematically and surreptitiously helping herself to her husband's assets ["... the most blatant and representative example of the influence ..." being the deed to the Florida condominium in 2008 (emphasis added)] and otherwise appropriating funds by the abuse of the power of attorney executed simultaneously with the 2005 will. It bears repetition that the undue influence concept speaks to the testator's

state of mind at the time of the execution of the will. What may have happened several years post execution is not probative of a claim of undue influence leading up to the making of this will. Further, the argument that when Dr. and Mrs. Schure moved to Florida in 1990 and he purportedly insisted she no longer work and paid her $1,000 per week in exchange for not working, even if true, did not create as advanced by objectants a climate of "uninterrupted" exploitation or exertion of influence by her that carried forward 15 years later to 2005.

Counsel, it is argued, engaged in unethical conduct in the face of an irreconcilable conflict of interest[1] in preparing decedent's will at all which should be considered in the sphere of undue influence. Michael P. Stafford, Esq. had apparently represented petitioner a decade or so prior to December of 2005 and indeed it appears that decedent had been introduced to Mr. Stafford sometime in 1999. It does not appear disputed that decedent himself reached out to Mr. Stafford in the summer of 2005 regarding his will.

The question of the prior representation and the obvious potential for a conflict was explained to decedent, according to several Rivkin Radler attorneys, to the point of advising him to retain other counsel to prepare the will. Dr. Schure, however, "insisted" he wanted them to prepare his new will. There is nothing at bar to indicate that Rivkin Radler in any way attempted to influence Dr. Schure as to the disposition of his property and it remains an essential element of an undue influence case to prove that undue influence was actually exerted on decedent (*Matter of Fiumara*, 47 NY2d 845 [1979]).

Since no proof has been offered that undue influence was actually exerted on decedent, summary judgment is also therefore granted and that objection dismissed as a matter of law.

---

[1]Counsel had previously represented Mrs. Schure.

To prevail upon a claim of fraud, rather than a preponderance of the evidence the higher standard of proof of clear and convincing evidence applies (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) and objectants must show that the proponent knowingly made false statements to the decedent to induce him to execute a will that disposed of his property in a manner contrary to that in which he would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]).

There is no mention of fraud in the voluminous opposition submitted. The respondents have likewise failed to sustain their burden on the fraud objection and therefore, so much of petitioner's motion for summary judgment as seeks to dismiss the respondents' objection on the ground of fraud is granted.

The petitioner has the burden of proving testamentary capacity. From an overall perspective on the question of testamentary capacity, it is essential that the testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property, and his relation to the persons who ordinarily would be the objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although he need not have precise knowledge of his assets, he must be able to understand the plan and effect of the will, and less mental faculty is required to execute a will than any other instrument (*see Matter of Coddington,* 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]).

In a reply affidavit submitted by Dr. Joseph Dimeo, decedent's treating physician for the period from 2002 through 2006, the doctor states the uncontroverted fact that "... the Decedent was diagnosed with Alzheimer's Disease in late-2004 ... ." In the moving papers, proponent had

submitted copies of a series of six reports of decedent's visits to that office beginning with December 20, 2004 and ending with one for December 8, 2005, the latter just 13 days before Dr. Schure executed the will in question. While it is not at all uncommon, most of the physician's handwriting is undecipherable but the copy of the December 20, 2004 report has an entry "Alz dementia." It is of course this diagnosis of cognitive dysfunction which is the basis of objectants' argument that Dr. Schure lacked testamentary capacity.

Proponent advances several factual and legal reasons supporting her position that decedent was competent to make a will on the date of its execution.

In determining the requisite capacity to execute a will, the bright line is the *precise time of execution.* Thus, it has been held that even a person suffering from mental illness including depression, dementia or even incompetency may nevertheless have the necessary testamentary capacity so long as the will is executed during a "lucid interval" (*Matter of Friedman*, 26 AD3d 723 [3d Dept 2006]*; Matter of Minasian*, 149 AD2d 511 [2d Dept 1989]; *Matter of Mooney*, 22 Misc 3d 1138 (A) [Sur Ct, Richmond County 2009]; *Matter of Hirschorn*, 21 Misc 3d 1113 [A] [Sur Ct, Westchester County 2008]).

There is evidence presented on this application that in July of 2005 decedent placed a phone call to Michael Stafford, Esq. and made an appointment to discuss his estate. A face-to-face meeting ensued on July 19, 2005 with Dr. Schure and both Stafford and another trust and estates attorney at the firm, associate Suzanne Q. Burke, Esq. Various aspects of decedent's familial relationships and disposition of assets were discussed, as was decedent's desire to make a new will, and lastly the possibility of a conflict of interest on Mr. Stafford's part was discussed. Further, there is every indication from averments of counsel that Dr. Schure was sufficiently

competent to make a will.

Another meeting followed on November 29, 2005 between Dr. Schure, both counsel indicated above, with yet a third Rivkin Radler attorney in attendance as a precursor to preparing a draft of the will previously discussed in July. The terms of the will were discussed including the designated beneficiaries, nominated fiduciaries, etc., and once again there is every indication from counsel of the decedent's sufficient mental acuity, one of the lawyer's describing him in a memorandum as "seem[ingly] completely competent."

Returning to the December 8, 2005 doctor visit in this chronology, decedent saw Dr. Dimeo's partner at the office complaining of pain in the right leg. That physician, Dr. Michael DiGiovanna, has submitted a reply affidavit in addition to that of Dr. Dimeo. It is not surprising that Dr. DiGiovanna appears not to have an independent recollection of this single visit with the decedent. However, of import is the fact that he opines that the office record for the December 8, 2005 visit has no indication of any concerns he had of decedent's mental capacity at that time, which would have been noted had there been any such concerns. Further, Dr. Dimeo states: "Decedent had lucid intervals in which he was alert, oriented, and of sound mind and memory in 2004, 2005 and 2006."

At the execution ceremony on December 21, 2005, decedent met with three Rivkin Radler lawyers, Stafford, Burke, and partner Bernard Feigen, Esq. Burke and Feigen witnessed the will and executed the self-proving affidavit. As both witnesses attested that to the best of their knowledge Dr. Schure was of sound mind, there is a presumption that that was the case (*Matter of Leach*, 3 AD3d 763 [3d Dept 2004]; *Matter of Mooney*, *supra*). Beyond presumptions, there is every indication from sworn statements by counsel that Dr. Schure was sufficiently

competent to make a will.

The first issue in connection with objectants' opposition to petitioner's motion for summary judgment concerns what the latter's counsel raises as fatal evidentiary flaws in the submission itself.

Objectants' opposition consists of a 77 page affidavit of counsel with reference to and attachment of a plethora of exhibits including, as germane here, copies of uncertified medical records and copies of deposition transcripts that are unsigned and unattested to. They are therefore not in admissible form and have not been considered on this motion. (*Matter of Delgatto*, 82 AD3d 1230 [3d Dept 2011]).[2]

The other issue revolves around the several affidavits in opposition from the decedent's children, daughter- in-law, and granddaughter. Petitioner argues that these affidavits should not be considered by the court, in whole or in substantial part, as prohibited by the Deadman's Statue (CPLR 4519) or are otherwise based on hearsay and/or improper opinion evidence without the requisite foundation. The Court of Appeals has determined 40 years ago that evidence that might be excludable under the Deadman's Statue could be considered for the purposes of *defeating* summary judgment provided it was not the only evidence offered on opposition to the motion (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]). Similarly, hearsay evidence is insufficient to defeat summary judgment if that is the only evidence offered in opposition (*Roche v Bryant*, 81 AD3d 707 [2d Dept 2011]). Thus, since the only evidence offered in opposition to the motion will be excluded at trial, the opposition fails to raise a triable issue of fact.

---

[2]Some of the unexecuted transcripts submitted by objectants and objected to by petitioner have been supplied in their proper executed form in the proponent's exhibits. Those have been considered.

The proponent's motion for summary judgment dismissing the objections is therefore granted.

Settle decree on notice.

Dated: December 17, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court