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

KENNETH D. LYNCH,
a/k/a KENNETH LYNCH,

Deceased.

File No. 2010-362129

Dec. No. 27462

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In this contested probate proceeding, the respondent, Karen Cullin, moves for: (1) a protective order pursuant to CPLR 3103; and (2) summary judgment dismissing the petition. The petitioner, Keith Lynch, cross moves for summary judgment pursuant to CPLR 3212 and SCPA 102 dismissing and striking the respondent's objections to probate.

The decedent, Kenneth D. Lynch, died on July 7, 2010, survived by his three children: Keith Lynch, the petitioner; Karen Cullin, the respondent; and Gary Lynch. An instrument purported to be the last will and testament of the decedent, dated May 5, 2003, was submitted for probate by the petitioner. The propounded instrument makes no provision for the respondent and recites that any share of the decedent's estate to which the respondent would be entitled should be disposed of as if she had not survived the decedent. Preliminary letters testamentary were issued to the petitioner by this court on September 10, 2010.

The respondent filed objections to probate alleging that: (1) on May 5, 2003, the decedent was not of sound mind or memory and was not mentally capable of making a will; (2) that the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by duress or undue influence practiced upon the decedent; (3) that the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by fraud practiced upon the decedent; and (4) that the propounded instrument was not

duly executed by the decedent.

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]).

TESTAMENTARY CAPACITY

The petitioner has the burden of proving 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]). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]).

In this case, the record establishes that at all relevant times, including the time when the will was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a will. In the affidavit of the attesting witness, Eileen Wilson, and in the deposition testimony of the attesting witness, Lisa O'Grady, and that of the attorney draftsman, John O'Grady, they unequivocally stated that the decedent was of sound mind at the time of the execution of the propounded instrument.

Based upon the foregoing, the petitioner has established prima facie that the decedent was of sound mind and memory when he executed the propounded instrument (EPTL 3-1.1). The

record is devoid of any admissible proof that at the date of the execution of the propounded instrument, the decedent was incapable of handling his own affairs or lacked the requisite capacity to make a will.

In an attempt to raise an issue as to the decedent's testamentary capacity, the objectant relies upon the report of a neuropsychological evaluation performed on September 9, 1999. This report is not sworn to or affirmed or certified, thus rendering it inadmissible in form and insufficient to defeat a motion for summary judgment (*Matter of Delgatto,* 82 AD3d 1230 [2d Dept 2011]). Moreover, even if such report had been in admissible form, the decedent's condition in September 1999, over three years before he executed the will at issue herein, fails to raise a triable issue of fact as to his testamentary capacity at the time he executed the will in May 2003. And, in any event, the report concludes that the decedent did not meet the criteria for dementia. The fact that the decedent's death certificate reported that he suffered from "Severe Alzheimer's type Dementia" at the time of his death on July 7, 2010, nearly seven years after execution of the propounded instrument, is not probative of the decedent's mental condition at the time of the execution of that instrument, and is insufficient to raise a triable issue of fact as to the decedent's testamentary capacity.

The respondent's argument that the decedent lacked testamentary capacity because he signed the propounded will as "Kenneth D. Lynch" when he was otherwise always known as "Kenneth Lynch" is without merit. In fact, the statements for the decedent's Chase credit card which the respondent had sent to her home were all in the name "Kenneth D. Lynch." Even in the absence of such evidence that the decedent had previously used his middle initial, the use or non-use of a middle initial in the signing of a will is hardly sufficient to create a triable issue of fact in

regard to the decedent's testamentary capacity.

None of the arguments raised by the respondent are sufficient to raise a triable issue of fact that the decedent lacked the requisite testamentary capacity at the time that he executed the propounded instrument. Accordingly, on the issue of testamentary capacity, the petitioner's cross motion for summary judgment is granted, the respondent's motion for summary judgment is denied, and the objection of lack of testamentary capacity is dismissed.

DUE EXECUTION

In a probate contest, the proponent has the burden of proof on the issue of due execution (*Matter of Stegner*, 253 App Div 282, 284 [2d Dept 1938], citing *Delafield v Parish*, 25 NY 9, 29, 34 [1862]). Due execution requires that the proposed will be signed by the testator, that such signature be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge his signature on the propounded will to each witness, that the testator publish to the attesting witnesses that the instrument is his will and that such attesting witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1). If the will execution is supervised by an attorney, the proponent is entitled to a presumption of regularity that the will was properly executed in all respects (*Matter of Tuccio,* 38 AD3d 791 [2d Dept 2007]). Where an attorney states to the attesting witnesses, in the decedent's presence, that the decedent is executing a will, such statement meets the publication requirement (*see Matter of Frank*, 249 AD2d 893 [4th Dept 1998]). If the decedent does not expressly request that a particular witness sign the will, such a request may be inferred from a testator's conduct and from circumstances surrounding the execution of the will (*Matter of Buckten*, 178 AD2d 981 [4th Dept 1991], *lv denied* 80 NY2d 752 [1992]). Additionally, a validly executed attestation clause serves as prima

facie evidence that the instrument was properly executed (*Matter of Collins*, 60 NY2d 466, 471 [1983]; 3 Warren's Heaton, Surrogate's Court Practice Section 42.05 [4] at 42-77 [7th ed 2006]).

Here, the affidavit and testimony of the respective attesting witnesses, as well as the testimony of the attorney draftsman, prima facie establish due execution of the propounded instrument. The fact that the attorney draftsman forgot to correct the date of the attestation clause and forgot to fill in the number of pages of the will in the attestation clause, does not mean the will was improperly executed. Absent from the record is any proof that the propounded instrument was not executed in conformity with the formal requirements of EPTL 3-2.1 (*see Matter of Weinberg*, 1 AD3d 523 [2d Dept 2003]). The respondent's argument that if the attorney draftsman made some mistakes, he might have made others, is mere speculation, and insufficient to raise a triable issue of fact on the issue of due execution. Because all of the statutory requirements were met and no issues of fact requiring a trial exist, the objection of lack of due execution is dismissed and the petitioner is granted and the respondent denied summary judgment regarding due execution.

UNDUE INFLUENCE AND FRAUD

In order to prove undue influence, the respondent 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]).

To prevail upon a claim of fraud, the respondent must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) 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]).

The respondent's affidavits submitted in support of her motion for summary judgment and in opposition to the petitioner's cross motion for summary judgment fail to raise any facts that support her objection that the petitioner or any other individual exerted undue influence upon the decedent. The affirmation of the respondent's attorney in opposition to the petitioner's cross motion for summary judgment raises arguments based on pure speculation regarding the undue influence objection, but since such affirmation is made by an attorney without personal knowledge and with no evidence to support his conclusory assertions, it is insufficient to oppose a motion for summary judgment (*Matter of Coviello*, 78 AD3d 696 [2d Dept 2010]).

The fraud objection is not addressed at all by the respondent in any of the papers in support of her own motion for summary judgment or in opposition to the petitioner's cross motion for summary judgment.

The record is devoid of any admissible evidence supporting the objections of undue influence or fraud and, accordingly, those objections are dismissed.

CONCLUSION

The respondent's motion for summary judgement is denied and the petitioner's cross motion for summary judgment is granted. All objections to the probate of the propounded instrument are dismissed.

In light of the decisions on the motion and cross motion for summary judgment, the respondent's motion for a protective order to postpone her deposition is denied as moot.

Settle decree on notice.

Dated: August 5, 2011

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