

**Matter of Smallman**

2011 NY Slip Op 33526(U)

December 14, 2011

Surrogate's Court, Nassau County

Docket Number: 2011-364123

Judge: III., Edward W. McCarty

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

-----X  
Probate Proceeding, Will of

File No. 2011-364123

HONEY SMALLMAN,

Dec. No. 27665

Deceased.  
-----X

In this contested probate proceeding, the petitioner, Alvin Frohman, moves for summary judgment pursuant to CPLR 3212 dismissing the objections to probate of the respondent, Scott Smallman, and admitting into probate the last will and testament of the decedent dated April 7, 1997 and a codicil dated August 2, 2006. For the reasons set forth herein, the motion is granted in its entirety.

The decedent, Honey Smallman, died on October 31, 2010, survived by her husband, Alvin Frohman, the petitioner, and by her two sons: Scott Smallman, the respondent, and David Smallman. An instrument purported to be the last will and testament of the decedent, dated April 7, 1997, as well as a codicil dated August 2, 2006, were submitted for probate by the petitioner. The purported will makes a specific bequest of \$25,000.00 to decedent's son, David Smallman, and leaves the decedent's interest in any real property, including any interest in a condominium apartment, as well as the contents, in trust for the benefit of her husband, Alvin Frohman, for his exclusive use for the remainder of his lifetime, with the balance of the trust being distributed to her son, Scott Smallman, upon her husband's death. However, the purported codicil provides that upon the decedent's death, her husband is to receive ownership of the condo at 30 Hampton Court, Woodbury, New York. The respondent, Scott Smallman, filed objections to probate of the purported codicil alleging that: (1) on August 2, 2006, the decedent was not of sound mind or memory and was not mentally capable of making a will or codicil thereto; (2) that the purported

codicil was not freely or voluntarily made or executed by the decedent, but was procured by duress and undue influence practiced upon the decedent; (3) that the purported codicil was not freely or voluntarily made or executed by the decedent, but was procured by fraud practiced upon the decedent; and (4) that the purported codicil was not duly executed by the decedent. No objections were made to the probate of the decedent's April 7, 1997 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 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 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 her will or codicil, the nature and condition of her property, and her relation to the persons who ordinarily would be the objects of her bounty (see *Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although she need not have precise knowledge of her assets, she must be able to understand the plan and effect of the will or codicil, and less mental faculty is required to execute a will or codicil 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 or codicil 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 codicil was executed, the decedent possessed the capacity required by EPTL 3-1.1 to make a will or codicil. In the affidavit and deposition testimony of the attesting witness to the codicil, Donna

Brinch; in the deposition testimony of the attesting witness to the codicil, Beth Haslam; and the affidavit of Harvey Mendelsohn, the decedent's accountant, who was also present at the execution of the codicil, they each unequivocally state that the decedent was of sound mind at the time of the execution of the propounded codicil.

Based upon the foregoing, the petitioner has established prima facie that the decedent was of sound mind and memory when she executed the codicil (EPTL 3-1.1). The record is bereft of any proof whatsoever that on the date of the execution of the codicil, the decedent was incapable of handling her own affairs or lacked the requisite capacity to make a will or codicil. Accordingly, on the issue of testamentary capacity, the petitioner's motion for summary judgment is granted, and the objection of lack of testamentary capacity is dismissed.

#### **DUE EXECUTION**

In a probate contest, the proponent also 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 or codicil be signed by the testator, that such signature be affixed to the will or codicil in the presence of the attesting witnesses or that the testator acknowledge her signature on the propounded will or codicil to each witness, that the testator publish to the attesting witnesses and that such attesting witnesses attest the testator's signature and sign their names at the end of the will or codicil (EPTL 3-2.1).

Here, the affidavit and deposition testimony of the respective attesting witnesses, as well as the affidavit of the decedent's accountant, who was also present at the time of the execution of the codicil, prima facie establish due execution of the codicil (*Matter of Tully*, 227 AD2d 288 [1st Dept 1996]). 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 the codicil was purportedly handwritten by someone other than the decedent and then photocopied prior to its execution is of no moment, as long as there was compliance with the formalities of execution (*Matter of Marin*, 82 AD3d 982 [2d Dept 2011]; *Matter of Saxl*, 32 Misc 2d 481 [Sur Ct, New York County 1961]). Because all of the statutory requirements for due execution 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 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 or codicil; and (3) the execution of a will or codicil, 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 her will or codicil, her family relations, the condition of her 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 her to execute a codicil that disposed of her property in a manner contrary to that in which she 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 opposition to the petitioner's motion for summary judgment fails to raise any facts that support his objection that the petitioner or any other individual exerted undue influence upon the decedent or procured the execution of the codicil by fraud. The respondent's allegation that the codicil may have been handwritten by someone other than the decedent, even if true, is not indicative, in and of itself, of undue influence or fraud. The record is devoid of any admissible evidence supporting the objections of undue influence or fraud and, accordingly, those objections are also dismissed.

### CONCLUSION

The petitioner's motion for summary judgment is granted. All objections to the probate of the propounded codicil are dismissed.

Settle decree on notice.

Dated: December 14, 2011

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