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

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Probate Proceeding, Will of

THERESA PIECH,

Deceased.

File No. 2011-368169

Dec. No. 29147

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In this contested probate proceeding, the proponent, Michael O. Lukas, moves for an order pursuant to CPLR 3212 granting summary judgment, dismissing the objections and admitting the propounded instrument dated to probate. The objectants are Nancy Wroblewski, William Guelakis, Janice Olivia Guelakis, and Nina Jean Lukas Miranda.

For the reasons set forth below, the motion for summary judgment is granted.

BACKGROUND

Theresa Piech died on February 10, 2010, leaving a will dated April 16, 2009. She was survived by her sister, Rachel Wroblewski ("Rachel"), and by six nieces and nephews: Michael O. Lukas ("Michael"), the proponent; Nancy Wroblewski ("Nancy"), William Guelakis, Janice Olivia Guelakis, and Nina Jean Lukas Miranda, the objectants; and Charles Guelakis. Under the terms of decedent's will, her residuary estate was bequeathed to Michael, who was also named as executor of decedent's estate.[1]

OBJECTIONS

The objectants have interposed the following objections to the propounded instrument: lack of testamentary capacity; lack of due execution; fraud; and undue influence.

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[1]The will reflects handwritten changes on pages 1, 2 and 4, apparently made by the decedent after the date of execution. These changes have no impact upon whether the proffered will should be admitted to probate, nor do they affect the ultimate distribution of decedent's estate in the event that probate is granted.

THE MOTION

In support of the motion for summary judgment to admit the will to probate, the proponent submits an affirmation of counsel; the affidavit of Rachel; a brief in support of the motion; the deposition testimony of Donald S. Hecht ("Hecht"), the attorney-draftsperson of the will who also supervised its execution; the deposition testimony of Michael; and a photocopy of a beneficiary designation in which the decedent named Nancy as sole beneficiary of her IRA account.

Counsel for Michael notes that the execution of the will was properly witnessed under the supervision of the attorney-draftsperson. A self-proving affidavit was executed and notarized. Both witnesses were examined. Hecht, currently retired from the practice of law, served as one of the witnesses. He indicated that although he had no independent recollection of decedent, his recollection had been refreshed by looking at materials generated by the computer contact program he utilized while in practice. Hecht testified that the decedent appeared in his office alone and asked for a new will to be drafted that same day, prior to surgery she had scheduled for the next day. She appeared to be of sound mind and not under any undue influence. Decedent explained the reasons for changing her prior will. The attorney prepared the will and advised her to return following her surgery so that he could create a more complete plan for her, but she never returned. He testified that the handwritten changes found on her will were not made in his office and were not present when the will was executed. He further testified that he does not know Michael or any of the other beneficiaries named in the will which he drafted.

OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

In opposition, the objectants submit the affirmation of counsel; a photocopy of the will offered for probate; a photocopy of decedent's prior will, dated March 11, 2002; transcripts of the deposition testimony of Hecht and Michael; a one-page medical record concerning decedent's state of mind and events which occurred in her hospital room on November 10, 2009; a power of attorney, dated November 10, 2009, in which the decedent named Michael and Nancy as her attorneys-in-fact; two deeds dated November 10, 2009 by which decedent transferred residential properties located at 276 and 286 Warren Street, West Hempstead, to Michael, subject to a life estate retained by the decedent; the report of the guardian ad litem appointed to determine Rachel's capacity to retain counsel and protect her own interests in connection with a separate proceeding brought by Rachel seeking letters of trusteeship for Michael to succeed the decedent as trustee of the trust created under the will of Anthony Wroblewski, (the father of decedent and Rachel); the written response of Rachel's attorney to the report of the guardian ad litem; and a memorandum of law.

Counsel for the objectants argues that the summary judgment motion is premature because the objectants are entitled to further discovery where facts may exist which support their position but which they cannot yet state (citing *Matter of Fasciglione*, 73 AD3d 769 [2d Dept 2010], and other decisions). Specifically, counsel points to her submission of a photocopy of decedent's hospital record from the Nassau University Medical Center (Exhibit E to the Affirmation in Opposition to Proponent's Motion for Summary Judgment).[2] The text of the

[2]Although counsel for the proponent did not object to the submission of this record, medical documents submitted for consideration during pre-trial motion practice must be certified and in admissible form (*Matter of Delgatto*, 82 AD3d 1230 [2d Dept 2011]). However, as

record, dated November 10, 2009 at 5:00 p.m., indicates that it was completed by a first -year resident. The record states, in part:

> "[Decedent] was examined [and] was not found to be completely oriented in time, place [and] person. When we came to [decedent's] room there was . . . Attorney in the room with [Michael] and [decedent] had signed a few legal documents which according to the attorney were not related to health but were related to her billing which the nephew would be taking care of now. [Decedent] had already signed the papers. We informed all of them about [decedent's] capacity but they still continued [and] then left . . . ."

It is undisputed that on that date, Michael and his attorney James J. Keefe ("Keefe"), who currently represents both Michael and Rachel and who was introduced to Rachel by Michael, visited decedent at the Nassau University Medical Center and supervised decedent's execution of (1) a power of attorney naming Michael alone as her attorney-in-fact and (2) two deeds transferring 276 and 286 Warren Street to Michael, with a retained life estate in each. Counsel for the objectants seeks a deposition of Keefe and a deposition of the resident who wrote the notes in decedent's hospital records. Objectants' counsel advises the court that Keefe has refused to submit himself for examination and counsel has not yet identified or located the medical resident.

Counsel further argues that there are material issues of fact with regard to due execution because the date of execution of the proferred instrument was the first time that decedent and the attorney who drafted the will and supervised its execution met. The supervising attorney, who did not retain his intake notes from meeting with the decedent, testified that decedent's will was

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discussed more fully below, this court's review of the medical record submitted by the objectants indicates that even if it had been considered in connection with the present motion, it would not have been sufficient to alter this court's decision to grant the motion for summary judgment.

the only "emergency-on-the-spot" will he prepared in 2009. Counsel also points to decedent's subsequent handwritten changes to the will.

In connection with fraud and undue influence, counsel points to what she terms Michael's "chronic pattern of overreaching and the exploitation of the confidential relationship he occupies with the testator and her sister . . . ." Counsel notes Michel's relationship with Rachel in connection with events which were reported by Rachel's guardian ad litem in 2013. As to testamentary capacity, counsel argues that the proponent has not offered any evidence to meet his burden that the decedent had capacity to execute her will. Counsel maintains that the proffered will is inconsistent with decedent's prior estate plan.

REPLY BRIEF IN SUPPORT OF THE MOTION

Counsel for Michael filed a reply brief in support of the motion for summary judgment, in which he argues that summary judgment may be granted on the record before the court, as no material issues of fact have been established concerning due execution, fraud, undue influence, or lack of testamentary capacity. Counsel maintains that decedent's will was a rational adjustment of her prior estate plan, in view of changed circumstances.

Although objectants argue that they need further discovery, counsel for Michael notes that the depositions they seek concern events which occurred seven months after the proffered instrument was executed by decedent. Moreover, the medical records from decedent's hospitalization at that time have been available for an extended period of time, and yet counsel for the objectants has given no indication of any effort to date to depose the medical resident who made the notes. It is argued that, in any event, Michael's alleged overreaching on November 10, 2009 can have no impact on the execution of a will seven months earlier, on April 16, 2009, even

if alleged overreaching could be proven. Counsel also notes that if the court allows objectants' counsel to examine Keefe, then Keefe may be disqualified as a witness from representing Michael, who would then be deprived of his counsel's representation, with no actual benefit to objectants.

DISCUSSION

Hecht met with the decedent for the first and only time on April 16, 2009, the day before she was scheduled for tongue cancer surgery. No one else was present at the meeting. At decedent's request, Hecht prepared the will that is the subject of this proceeding and supervised its execution in his office on that same day.

Hecht and an individual named Oralee Shelton served as witnesses to the will. The witnesses executed a self-proving affidavit and it was notarized by an attorney. In his deposition testimony, Hecht averred that he observed the statutory formalities in the execution of the propounded instrument.

The decedent's prior will, executed March 11, 2002, left her estate to her husband. In the event he did not survive her, the estate was to pass to Rachel. If Rachel predeceased the decedent, then the estate was to pass equally to Michael and Nancy subject to certain specific bequests. Michael and Nancy were named as co-executors of the will.

Prior to decedent's meeting with Hecht, decedent's husband had died, and Rachel was admitted to an extended care facility, which was paid for by Medicaid. Hecht gave the following testimony:

> "The client told me that she wanted to leave everything to her sister who was disabled. I was very concerned with that and sensitive to the issue being a Medicaid attorney, and I said, 'Okay. Fine. You are going into the hospital. You

> want to make some changes to the Will. Let's make changes to the Will but you have to come back here right away because we can protect that money from [sic?] your sister by putting it into a Supplemental Needs Trust, so that should your sister require Medicaid, this wouldn't prevent her from receiving Medicaid" (Examination of Donald S. Hecht, p 9 at 5-16).

Respondent's Exhibit 1, annexed to Hecht's deposition, is a computer memo from Hecht's law practice, dated 4/16/09, which states, in its entirety:

> "Emergency on the spot LWT [last will and testament]. Client going in for tongue cancer surgery tomorrow. Has LWT leaving all to sister on Medicaid in NH [nursing home]. Changed will to remove sister. Urged client to return to do complete EP [estate plan] including SNT [supplemental needs trust]f [for] Sister."

At their meeting, Hecht advised decedent that monies left to her sister which were not placed in a supplemental needs trust for Rachel's benefit might prevent Rachel from receiving Medicaid. His notes indicate that he told decedent "that a third party Supplemental Needs Trust for her sister in lieu of any outright disposition would be preferable" (Examination of Donald S. Hecht, p 27 at 16-18). Hecht also testified that he drew the will (which left decedent's estate to Michael) according to the decedent's instructions on that day (Examination of Donald S. Hecht, p 13 at 7-8), and that he did not know any of the beneficiaries named by the decedent in the will he drafted for her. Hecht indicated that it was his belief, based upon his general practice, that it was his own suggestion to decedent that the way to handle her estate plan temporarily was to prepare a new will which would not name Rachel. The decedent would then return at a later date, at which time Hecht would prepare a more complete estate plan for decedent (Examination

of Donald S. Hecht, p 58 at 13-20 and p 59 at 2). Hecht sent follow up letters to decedent on April 29, 2009 and February 12, 2010, but decedent never returned.

ANALYSIS

SUMMARY JUDGMENT

Summary judgment is a drastic remedy (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]), awarded only sparingly (*Ronder & Ronder, P.C. v Nationwide Abstract Corp*., 99 AD2d 608 [3d Dept 1984]), and only when there are clearly no triable issues of fact presented (*NBT Bancorp. v Fleet/Norstar Fin. Group*, 87 NY2d 614, 625 [1996]). In a proper case, however, the court's granting of a summary judgment motion is not only appropriate, but denial of such a motion is reversible error, even in a probate proceeding (*Matter of Greenspan*, 43 AD2d 998 [3d Dept 1974], *affd* 36 NY2d 737 [1975]). To prevail on a motion for summary judgment, the movant must establish his or her right to a directed verdict as a matter of law (*Friends of Animals v Assoc. Fur Manufacturers, Inc*., 46 NY2d 1065, 1067 [1979]). If the movant meets this threshold, the burden then shifts to the party moved against to lay bare his or her proof in opposition in evidentiary form (*Matter of Bank of New York*, 43 AD2d 105, 107 [1st Dept 1973], *affd* 35 NY2d 512 [1974]). The party moved against may not successfully rely merely on conjecture or surmise (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]); a mere hope that somehow or other the objectant will be able to substantiate his or her allegations at trial is insufficient to deny summary judgment to a proponent who has made out a *prima facie* case

(*Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33 [1st Dept 1999]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [2d Dept 1987]).

Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, 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 remedy, however, is inappropriate where there are material issues of fact (*Matter of Pollock*, 54 NY2d 1156 [1985]).

TESTAMENTARY CAPACITY

The proponent has the burden of proving testamentary capacity. It is essential that testator understand in a general way the scope and meaning of the provisions of testator's will, the nature and condition of testator's property and testator's relation to the persons who ordinarily would be the natural objects of his or her bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although the testator need not have a precise knowledge of his or her assets (*Matter of Fish*, 134 AD2d 44 [3d Dept 1987]), the testator 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 (*see Matter of Fiumara*, 47 NY 2d 845, 847

[1979]) 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]). "However, when there is conflicting evidence or the possibility of drawing inferences from undisputed evidence, the issue of capacity is one for the jury" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]).

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. Pursuant to their deposition testimony, the attesting witnesses stated that the decedent was of sound mind at the time of the execution of the propounded will. This testimony was buttressed by the testimony of the attorney-draftsperson who served as one of the witnesses only after meeting privately with the decedent to discuss the proposed distribution of her estate. The self-proving affidavit also support decedent's competency at the time she executed the will.

Based upon the foregoing, the proponent has established prima facie that decedent was of sound mind and memory when she executed the will (EPTL 3-1.1). The record is devoid of any proof that at the date of the execution of the propounded instrument, decedent lacked the requisite capacity to make a will.

Accordingly, the objection of lack of testamentary capacity is dismissed, and summary judgment is granted on the issue of testamentary capacity.

DUE EXECUTION

The proponent has the burden of proof on the issue of due execution (*Matter of Kumstar*, 66 NY2d 691 [1985]). 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 the witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1).

In the present case, the witnesses to decedent's will no longer remember the will execution, however, "[a] will may be admitted to probate notwithstanding the failed or imperfect memory of both attesting witnesses" (*Matter of Collins*, 60 NY2d 466, 468 [1983]). "Memories fade over time and witnesses become unavailable. However, a will may be admitted to probate even if both attesting witnesses cannot recall the will execution. Sufficient 'other facts' may be presented to convince the court that the statute has been satisfied" (*Matter of Miele*, NYLJ, Aug. 28, 1997, at 26, col 4 [Sur Ct, Westchester County], citing EPTL 3-2.1; *Matter of Gagliardi*, 55 NY2d 109 [1982]; *Matter of Collins*, 60 NY2d 466 [1983]).

Where a will includes a valid attestation clause, it provides prima facie evidence that the will was executed properly (3 Warren's Heaton on Surrogates' Courts § 42.05 [4]). Where the execution of a will is supervised by counsel, there is a presumption of due execution in accordance with New York law (*Matter of Possenriede*, NYLJ, Feb. 26, 2003, at 26, col 2 [Sur Ct, Nassau County]; *Matter of Lichtenberg*, NYLJ, Mar. 21, 2001, at 20, col 5 [Sur Ct, Kings County 2001]). The court finds that all of these elements, combined with testimony concerning usual office practice, are sufficient to establish that the will was executed in conformance with the law (see *Matter of Malan,* 56 AD3d 479, 479 [2d Dept 2008]). In order to rebut this

presumption and raise a material issue of fact, objectants would have had to offer evidence in admissible form, not hearsay, speculation and conclusory allegations (*Matter of Halpern*, 76 AD3d 429 [1st Dept 2010]; *Matter of Levenson*, 289 AD2d 577 [2nd Dept 2001]). Objectants have failed to do so. 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]). There being no issue of fact concerning due execution, summary judgment is granted to Michael on this issue, pursuant to CPLR 3212 (b).

FRAUD

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false statements to 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 1993]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). There is no such evidence in this case (*Matter of Philip*, 173 AD2d 543 [2d Dept 1991]). Accordingly, the objection of fraud is dismissed.

UNDUE INFLUENCE

In order to prove undue influence, the objectant 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]). Circumstantial evidence may be sufficient to warrant a trial on the question of undue influence (*Matter of Pennino*, 266 AD2d 293 [2d Dept 1999]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]).

The objectants bear the burden of proving undue influence (*Matter of Connelly*, 193 AD2d 602 [1993]; *Matter of Strand*, NYLJ, May 10, 2007, at 30, col 5 [Sur Ct, Kings County 2007]). They must show that the undue influence "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which 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 Walther*, 6 NY2d 49, 53 [1959]). This must be distinguished from a testamentary plan which reflects "affection, the desire of gratifying the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices" (*id.*). Instead, objectants would have to show "a

coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted" (*id*.). While "undue influence most often is not the subject of direct proof, but rather is shown by circumstantial evidence" (*Matter of Panek*, 237 AD2d 82, 84 [4th Dept 1997]). The circumstantial evidence must be substantial and must not allow for alternative explanations (*Matter of Walther*, 6 NY2d 49, 54 [1959]). "[A]n inference of undue influence cannot be reasonably drawn from circumstances when they are not consistent with a contrary inference" (*Matter of Ruef*, 180 App Div 203, 204 [2d Dept 1917] [internal citation omitted], *affd* 223 NY 582 [1918]).

In support of her opposition to the motion for summary judgment, counsel for the objectants cites *Matter of Martinez* (2007 NY Misc LEXIS 6891 [Sur Ct, New York County 2007]):

> "Direct evidence of undue influence is seldom available. Accordingly, the law permits it to be shown by facts and circumstances leading up to and surrounding execution of the will. It may be demonstrated by 'all the facts and circumstances surrounding the testator, the nature of the will, [his] family relations, the condition of [his] health and mind, [his] dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person'" *(Matter of Martinez*, 2007 NY Misc LEXIS 6891 [Sur Ct, New York County 2007] [emphasis added] [internal citation omitted]).

The evidence presented by objectants in support of undue influence relates to events which occurred (1) seven months after decedent executed her will, as noted in an uncertified medical record, and (2) four years after decedent's death, in the form of a 2013 report of a guardian ad litem concerning the relationship between Michael and Rachel, and not between

Michael and the decedent. The evidence hardly relates to "facts and circumstances leading up to and surrounding the execution of the will" (*id*.). While one may propose that an inference may be drawn between undue influence and the decedent's change of her testamentary plan to name Michael as her residuary beneficiary, it can equally be inferred that the changes implemented by the decedent reflect the death of her husband and the occurrence of Rachel's accident and Rachel's subsequent reliance upon governmental benefits, all of which occurred after the execution of decedent's penultimate will and prior to her execution of the proffered instrument. Decedent's omission of Nancy from decedent's last will may be reflected in the beneficiary designation executed by decedent on September 9, 2009, in which she named Nancy as the beneficiary of her IRA account at Capital One Bank. The court notes that the other objectants were named in neither the penultimate or final will.

The record is devoid of any evidence supporting the objection of undue influence in the time frame leading up to or surrounding the execution of the proffered will; the objection is, therefore, dismissed.

CONCLUSION

Proponent's motion is granted; the objections to the April 16, 2009 will are dismissed. A decree may be entered admitting the propounded instrument to probate.

Settle decree.

Dated: December 11, 2013

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