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

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Probate Proceeding, Will of

File No. 2010-362502

BERNICE HOFFENBERG,

Dec. No. 31105

Deceased.

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In this contested probate proceeding, petitioner Martin Hoffenberg moves for summary judgment, pursuant to CPLR 3212, granting probate to the last will and testament of Bernice Hoffenberg. For the reasons set forth below, the motion is granted.

BACKGROUND

As reviewed in this court's previous decisions pertaining to the probate proceeding,[1] Bernice Hoffenberg died at the age of 88 on September 25, 2010, survived by her twin sons, Martin and Steven. Martin filed an instrument dated August 17, 2010 for probate, and Steven filed objections. Preliminary letters issued to Martin, and they have been repeatedly renewed. The probate proceeding was delayed in part because until the end of 2013 objectant was confined to a Federal penitentiary. During this time period, Steven was represented by a court appointed guardian ad litem. Upon his release, Steven hired private counsel who appeared in this matter on February 12, 2014.

THE MOTION

Martin asks the court to grant him summary judgment, dismiss the objections filed by Steven, and admit the decedent's will to probate. In counsel's affirmation in support, he notes that Steven objects to probate based upon lack of capacity, lack of due execution, undue

[1]Dec. No. 29519, issued on January 23, 2014, Dec. No. 29862, issued June 13, 2014, and Dec. No. 30561, issued on December 19, 2014.

influence and fraud. Counsel argues that all of the evidence demonstrates conclusively that the decedent had capacity to execute the proffered will, that the will was properly executed under the supervision of an attorney, and that absolutely no evidence of fraud or undue influence was introduced by objectant. Counsel further argues that the deposition testimony of the draftsperson and the sole surviving witness to the will execution leave no substantive doubt about decedent's capacity and her proper execution of the instrument.

AFFIRMATION IN RESPONSE

Counsel for Steven filed an affirmation in opposition to Martin's motion, arguing that for several years prior to the decedent's death, her financial affairs were controlled by Martin, who was her attorney-in-fact. Counsel notes that Martin initiated the conversation with the decedent concerning a review of her estate plan. He points to the fact that decedent's prior will, dated 1998, included a specific bequest to Steven, in addition to including precatory language about Martin using monies for the benefit of Steven.

Counsel further notes that Martin supervised decedent's execution of her will and procured the witnesses and notary public, despite having never supervised a will execution prior to that date.

REPLY AFFIRMATION

Counsel for Martin argues that the affirmation of Steven's counsel, filed in response to the motion for summary judgment, lacks evidentiary value and is insufficient to defeat a motion for summary judgment. No affirmation was filed by Steven and, it is argued, no evidence in admissible form was produced to create issues of fact that would require a trial.

Counsel also notes that objectant misrepresents the decedent's will as being inconsistent

with her prior will, when the two documents were largely consistent, in that both wills made no substantive provisions for Steven, who had been estranged from his mother for many years. In response to the assertion that Martin controlled the decedent's finances and served as her attorney-in-fact, counsel for Martin notes the clear testimony that the decedent handled her own financial affairs, and that Martin never exercised the power of attorney granted to him. Counsel for Martin states that other than referring his mother to an old friend who specialized in estate planning, Martin had nothing to do with the planning and drafting of his mother's will and trust, which included no provision for Steven or Martin, but left everything to a trust for the benefit of Martin's daughters.

ANALYSIS

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]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). 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]).

Due Execution

The first objection raised by Steven is a lack of due execution. The requirements of due execution are set forth in Section 3-2.1 of the EPTL. In accordance with this section, every will must be in writing and executed with specific formalities. The will must be signed at the end by the testator or someone else at the testator's direction. The signature of the testator must be affixed to the will in the presence of each attesting witness or acknowledged by the testator to each witness that her signature is affixed to the will. Finally, the testator must declare that the instrument to which her signature has been affixed is her will. At least two attesting witnesses must attest to the testator's signature and, at the request of the testator, sign their names and affix their addresses.

The decedent's will was executed at her home under the supervision of her son, Martin, a licensed attorney, in front of two witnesses. Although one witness died prior to being examined,

a signed and notarized self-proving affidavit was affixed to the will, and the surviving witness testified that the requirements of due execution were met. Although counsel for Steven claims that the surviving witness was an employee of Martin and had a limited command of English, these allegations are not supported by the deposition testimony provided by the witness. The motion for summary judgment on the issue of due execution is granted.

Testamentary Capacity

The proponent bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them" (*id.*). As a general rule and until the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

Alan C. Rothfeld, the attorney who drafted the decedent's will, testified that he knew the decedent for many years, and that when he and she discussed her about her testamentary plan, she spoke with "a very strong voice. She sounded like the old Bernice. Feisty is how I would describe it" (Transcript of Rothfeld deposition, p. 18).

The witness to the will execution, who had worked for the decedent as a live-in aide during the nine months preceding the decedent's death, testified that the decedent read a newspaper daily, carried on constant conversations with her aide, and never forgot anything. She further testified that at the will execution the decedent "was happy. She said she wants

everything to go to her grandchildren." The witness further testified that at the time of the execution, the decedent was not in a wheelchair, took no medications, and read the will without the need for eyeglasses.

The objectant, in turn, did not introduce any records, testimony, or other evidence that would support his claim that the decedent lacked testamentary capacity. Accordingly, the court finds that Martin Hoffenberg has met his burden of proving that the decedent possessed testamentary capacity on the date she executed her will. The petitioner's motion for summary judgment on the issue of testamentary capacity is granted.

Undue Influence

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby,* 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of Fiumara,* 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law: "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency . . . . It must not be the promptings of 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, but 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, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge,* 70 NY 387, 394 [1877]; *see also Matter of Kumstar,* 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by

circumstantial evidence (*Matter of Walther,* 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]*; Matter of Burke,* 82 AD2d 260, 269 [2d Dept 1981]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28, 31 [1901]; *Children's Aid Socy. v. Loveridge,* 70 NY 387, 395 [1877]; *Matter of Callahan,* 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; *Matter of Elmore,* 42 AD2d 240, 241 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v. Loveridge,* 70 NY 387, 402 [1877]; *Matter of Kruszelnicki,* 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the natural objects of his affection (*Matter of Burke,* 82 AD2d 260, 273 [1981]; *see Matter of Kaufman,* 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara,* 85 AD2d 669, 671 [2d Dept 1981]).

In the instant proceeding, testimony was offered that the petitioner was close with his mother, visiting her often and providing assistance with certain tasks. The attorney who prepared the decedent's will was recommended by petitioner, and the petitioner supervised the execution of the will, but he was not involved in the discussion between the decedent and her attorney concerning her testamentary plan and the preparation of the will and the trust. No evidence has

been offered to show the exercise of undue influence. The petitioner's motion for summary judgment on undue influence is granted.

Fraud

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of his property in a manner different from the disposition he would have made in the absence of that statement" (*Matter of Clapper,* 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). Indeed, to defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent to induce her to make this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (NY PJI 7:60 [2006]). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]). As objectant has introduced no evidence of actual misrepresentation, the petitioner's motion for summary judgment on the issue of fraud is granted.

CONCLUSION

No proof was offered that the decedent lacked capacity or failed to duly execute her will, or that the will was the result of fraud or undue influence. Accordingly, the motion for summary judgment is granted in its entirety, and the decedent's last will and testament dated August 17, 2010 will be admitted to probate.

Settle decree.

Dated: December 14, 2015

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