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

MARY J. DIMICELI,

Deceased.

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DECISION
AND ORDER
File No. 2014-379410
Dec. No. 31926

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

In this contested probate proceeding, the court has before it petitioner, Ronald DiMiceli's motion for summary judgment. Objectant, Donald DiMiceli's verified objections to probate raise the following issues: (i) lack of capacity; (ii) lack of due execution; and (iii) fraud, undue influence and duress.

On January 18, 2012, decedent, Mary J. DiMeceli, and her husband Frank, executed

mirror wills at the offices of Christopher W. Critelli, Esq., as well as other documents, including a bargain and sale deed of their residence at 75 Hendrickson Avenue, Rockville Centre, transferring title to such property to Ronald DiMiceli, subject to reservation of a life estate in their favor. Frank died on December 30, 2013. His will was not probated. Mary died on March 29, 2014. On April 12, 2014, Ronald filed a petition to probate Mary's purported will.[1] On October 30, 2014, Mary's other son, Donald, filed verified objections to probate. Following completion of disclosure proceedings, petitioner moves for summary judgment dismissing the objections and for probate of the will.

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, *supra*; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so *(Zuckerman v City of New York*, *supra; Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas*

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[1] The only property identified in the petition is $15,000.00 in personal property. The purported will divides the residuary estate evenly between Ronald and Donald.

Construction Corp., 166 AD2d 401 [2d Dept 1991]). The court's function is issue finding, not issue determination (*see Matter of Suffolk County Dept. Of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*see Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]; *Groger v Morrison Knudsen Co.*, 184 AD2d 620 [2d Dept 1992]). "Where different inferences may be drawn from facts that are undisputed, the case must go to trial and summary judgment will be denied" (*Sodexho Management, Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]; *Shea v Johnson*, 101 AD2d 1018, 1019 [4th Dept 1984]).

Summary judgment in contested probate proceedings is appropriate where a contestant fails to raise any issues of fact regarding execution of the will, testamentary capacity, undue influence or fraud (*see 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]). Summary judgment is appropriate on the issue of due execution only when the objections utterly lack merit (*see Matter of Greene*, 89 AD3d 941 [2d Dept 2011])

CPLR 3212[b] requires that supporting affidavits be by a person with personal knowledge and attorney affirmations often do not meet this criterion (*see Ruddy v Silver*, 66 AD2d 950 [3d Dept 1978] ("It is well established that an affidavit by an attorney lacking personal knowledge of the facts lacks probative value and should be disregarded," citing *Capelin Assoc. v Globe Mfg. Corp*., 34 NY2d 338, 342 [1974]; *Equipment Fin. v Selected Meat Packers*, 57 AD2d 1017 [3d Dept 1971]).

Objectants' factual contentions:

Objectant's counsel contends that genuine issues of fact exist which preclude the awarding of summary judgment. In support, counsel points to a devise in decedent's will of the real property identified as 75 Hendrickson Avenue and states that it "is directly contradicted by the intake notes of attorney draftsman, Christopher W. Critelli" which appear to describe a testamentary plan where Ronald receives 60% and Donald receives 40% of her estate. In other words, the testamentary intent appearing in counsel's 8/23/2011 notes is at variance with the disposition set forth in the 1/18/2012 will.

Counsel also notes that neither of the two attesting witnesses "were able to testify that the decedent said anything which would indicate a publication of her will prior to signing it." Witness Cervone did not recall if anything was said by either the decedent or her counsel prior to the signing. Witness Campone likewise did not recall any pre-signing statements.

The opposition submission does not address any other factual contentions.

Due Execution:

The proponent of a will offered for probate has the burden of proving by a fair preponderance of the credible evidence that the instrument was properly executed and that the testatrix was mentally competent. The proponent has the burden of proving all of the elements of due execution, including the testator's signature (*see Matter of Shaver*, 133 Misc 112 [Sur Ct, Oneida County 1928], *affd*, 227 A.D. 646 [4th Dept 1929]).

At least two attesting witnesses must sign the will (EPTL § 3-2.1 [a] [4]). The testator must tell the attesting witnesses that the instrument is her will (EPTL § 3-2.1 [a] [3]). If she does not, the will is invalid (*see Matter of Stachiw*, NYLJ, December 9, 2009, at 25, col. 3 [Sur Ct, Duchess County]; *see Matter of Beckett*, 103 NY 167 [1886]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]).

All testators enjoy a presumption of competence and the mental capacity required for wills is less than that required for any other legal instrument (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept1952], *affd* 307 NY 181 [1954]). 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, 587 [2d Dept 1984]).

The elements of due execution are that the testator's signature should be at the end of the will, the attesting witnesses must know that the signature is the testator's, the attesting

witnesses must know that it is the testator's will and the attesting witnesses must sign within a thirty-day period (EPTL § 3-2.1). The formalities of EPTL § 3-2.1 should be scrupulously observed in all cases, particularly when a decedent is near death *(Matter of Walker*, 124 AD3d 970 [3d Dept 2015]).

In this case, the execution of the will was supervised by attorney-draftsperson Christopher Critelli, whose uncontested affidavit sets forth his normal procedures.[2] At his examination, he did not recall the actual execution ceremony. Nevertheless, it is uncontested that he was present and supervised the execution of the will. This is sufficient to create the inference of due execution (*Matter of Vickery*, 167 AD2d 828 [4th Dept 1990]). Accordingly, the petitioner has established his burden of due execution. The burden now shifts to the objectants.

The testimony of the witnesses elicited by objectant is that they did not recall the ceremony. They each attested to the due execution of the will, signing below the following statement:

> SIGNED, PUBLISHED, AND DECLARED by the said testatrix, MARY J. DIMICELI, as her Last Will and Testament, in our presence and hearing, and we thereupon, at her request, in her presence and in the presence of each other, have hereunto set our names as witnesses this 18th day of January, 2012.

They each executed a self proving affidavit setting forth, under oath all the elements of due

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[2] While attorney Critelli was examined, no inquiry was made as to his normal procedures.

execution. The fact that when examined on October 20, 2014, at the SCPA § 1404 hearing, 33 months after the execution, they did not recall the ceremony, does not overcome the inference of due execution (*see Estate of Collins*, 60 NY2d 466, 469-471 [1983]). "[A] will may be admitted to probate even if both attesting witnesses cannot recall the will execution" (*Estate of Collins, supra*, at 470). As stated in *Matter of Kellum*, 52 NY 517, 519 [1873] and referenced in *Estate of Collins*:

> If the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time. In proportion to the absence of memory, should care and vigilance be exercised in examining the facts to prevent fraud and imposition; but if the circumstances of good faith and intelligence of the witnesses satisfy the judgment that the statute has been complied with, there is no rule of law to prevent admitting the will to probate, and this accords with the authorities in this State.

Thus, the court concludes that while the inability of the attesting witnesses to recall the execution ceremony requires intensified care and vigilance in examining the remaining evidence, that fact, standing in isolation, is insufficient to overcome the inference of due execution.

In view of the foregoing, the proponent of a will offered for probate has the burden of proving by a fair preponderance of the credible evidence that the instrument was properly executed and that the testatrix was mentally competent. The proponent has the

burden of proving all of the elements of due execution, including the testator's signature. *(see Matter of Shaver*, *supra*, 133 Misc 112 [Sur Ct, Oneida County 1928], *affd*, 227 App Div 646 [4th Dept 1929]). Summary judgment is appropriate on the issue of due execution only when the objections utterly lack merit (*see Matter of Greene*, 89 AD3d 941 [2d Dept 2011]). The proponent has made out a prima facie case for due execution. Here the objection relies solely on the inability of the attesting witnesses to recall the execution event and utterly lacks merit as no admissible evidence of possible irregularity with respect to the signature and publication has been presented. Summary judgment dismissing the objection as to due execution/lack of publication is **GRANTED**.

Testamentary Capacity.

The primary question is whether at the time of the execution of the propounded will was the testator of sound mind and memory (*see* EPTL § 3-1.1). The burden of proof on this question is on the proponent (*see Estate of Kumstar*, 66 NY2d 691 [1985]). The proponent must also establish that the will truly reflected the testator's wishes (*see Matter of Dix's Will*, 13 NY2d 846 [1963]).

General knowledge of scope of her real and personal property and recall of natural recipients of testator's bounty.

The purported will contains a specific bequest of the 75 Hendrickson Avenue property to Ronald DiMiceli and leaves the residual estate to the two sons, Ronald and Donald, in equal shares. Ronald and Donald constitute the natural recipients of her

bounty. As noted above, objectant Donald DiMiceli contends that the specific bequest is contrary to the intake notes of the attorney draftsman, which have a August 23, 2011 date. The will is dated January 18, 2012. As noted above and factually uncontested, the testatrix and her husband executed a deed for the Hendrickson Avenue property contemporaneous with their execution of the mirror wills. Critelli explained the inconsistency between the specific bequest and the deed in his examination and objectant does not contest his explanation. With the real property transferred out of the estate, the equal distribution of the residual estate is the same as would occur if the purported will were denied probate. Thus the will and the deed addressed the entirety of decedent's estate.

Critelli's testimony concerning his interviews of testator, backed up by his contemporaneous notes, was that the property of the husband and wife consisted of the Hendrickson Avenue property and some money in savings. Objectant does not suggest the existence of any other property. These items are all subject to clear treatment in the purported will.

In this case, the court finds that there are no issues of fact as to the decedent's testamentary capacity. As previously noted, the relevant inquiry is whether the decedent was acting intelligently and rationally at the time the will was made (*see Matter of Hedges*, *supra*, 100 AD2d at 588). No evidentiary facts to the contrary are presented.

"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*, *supra*, 66 NY2d at 692). There is no conflicting evidence and summary judgment dismissing the objection of lack of capacity is accordingly **GRANTED**.

Fraud:

The contestants bear the burden of proof on the issues of fraud and undue influence (*see Matter of Gross,* 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). To prove fraud, the contestants must show by clear and convincing evidence that a false statement was made to the testatrix that induced her to make a will disposing of her property differently than she would have if she had not heard the fraudulent statement (*see Matter of Gross*, *supra*, 242 AD2d 334). There is simply no evidence adduced that the will was the product of fraudulent conduct or duress. Accordingly, therefore, the proponent's motion for summary judgment dismissing the objection of fraud is **GRANTED**.

Duress:

Objectant presents no evidence of duress. Accordingly, the proponent's motion for summary judgment dismissing the objection of duress is **GRANTED**.

Undue Influence:

In order to prove undue influence, the contestants must show (1) the existence and

exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testatrix 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, 53-54 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testatrix, the nature of her will, 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). Without a 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]). It can be proven by circumstantial evidence (*see Matter of Elmore's Will*, 42 AD2d 420, 421 [3d Dept 1973]). It is seldom practiced openly but is the product of persistent and subtle suggestion imposed upon a maker fostered by the exploitation of a relationship of trust and confidence (*see Matter of Burke*, 82 AD2d at 269-271).

In this case, the court finds no evidence of undue influence has been introduced. Indeed, the opposition submission addresses only the purported variance between the attorney draftsman's notes and the purported will and the lack of recollection of the details of the execution ceremony by the attorney draftsman and the two attesting witnesses. There is nothing before the court to preclude the grant of summary judgment

dismissing the objection of undue influence. Under such circumstances, a finding of lack of undue influence as a matter of law is warranted (*Matter of Walther*, *supra*, 6 NY2d at 53-54; *Matter of Burke*, *supra*, 82 AD2d at 269-271), and summary judgment dismissing that objection is accordingly **GRANTED**.

Conclusion

Accordingly, the proponent's motion for summary judgment is **GRANTED** in the entirety. The purported Last Will and Testament of Mary J. DiMiceli, dated January 18, 2012, is admitted to probate, and Ronald DiMiceli is appointed executor, subject to qualification, to serve without bond.

This the decision and order of the court.

Dated: December 13, 2016
Mineola, New York

E N T E R :

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HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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