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

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Probate Proceeding, Will of

PETER COULOUMBIS,

Deceased.

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DECISION

File No.: 2015-4568/A

M E L L A, S.:

The following papers were considered by the court (CPLR 2219[a]) in deciding these competing motions for summary judgment (CPLR 3212) in a contested probate proceeding:

| Papers | Numbered |
|---|---|
| Notice of Motion for Summary Judgment, Affirmation in Support, with Exhibits 1 through 16 and Memorandum of Law in Support | 1, 2, 3 |
| Affirmation in Opposition to Motion, with Exhibits A through G | 4, 5 |
| Reply Affirmation in Further Support of Motion and Reply Memorandum of Law | 6, 7 |
| Reply Affidavit of Nikki Couloumbis in Further Support of Motion, with Exhibits A through K | 8 |
| Reply Affidavit of Diane Christopher in Further Support of Motion, with Exhibit A | 9 |
| Notice of Cross-Motion for Summary Judgment and Affirmation in Support | 10, 11 |
| Reply Affirmation to Cross-motion | 12 |

Cross-motions for summary relief (CPLR 3212) are presently before the court in this contested proceeding for probate of an instrument dated October 15, 2015. Proponents Diane Christopher (Diane) and Nikki Couloumbis (Nikki) seek dismissal of the verified objections filed by decedent's nephew Nicholas Christopher (Nicholas) which allege that decedent lacked capacity, and that the instrument was not duly executed and was the product of fraud and undue

influence. Nicholas cross-moves for summary judgment dismissing the petition for probate. On the record, in open court on July 25, 2018, the motions' return date on this court's miscellaneous calendar, the court granted proponents' motion for summary judgment in its entirety, dismissed the objections to probate, and denied Nicholas's cross-motion. At that time, the court also advised the parties that a written decision further explaining the court's reasoning would be issued.

Relevant Facts

Decedent Peter Couloumbis died on November 19, 2015, at the age of 87, leaving an estate worth approximately three million dollars. He was survived by two nieces, Diane and Nikki, and two nephews, Nicholas and Zachary Couloumbis (Zachary). The propounded instrument, executed approximately one month before decedent's death and while he was hospitalized at Southampton Hospital, nominates Diane and Nikki as co-executors, makes specific bequests to decedent's grandnieces and grandnephew and leaves the residuary in equal shares to Diane, Nikki and Zachary. The propounded instrument is different from instruments that decedent had executed in September 2014 and in October 2013, in that, under those two instruments, the residuary is divided equally between Nikki and Zachary, and Diane is not provided for. A February 2013 instrument also executed by decedent leaves the residuary estate to Diane, Nikki and Zachary. Thus, Nicholas is not a beneficiary under any of the last four testamentary instruments executed by decedent.

The record reflects that the October 2013 instrument, the September 2014 instrument and the propounded instrument were drafted by the law office of Rayano & Garabedian, P.C. One of its principals, Michael Garabedian, testified during his SCPA 1404 examination, that his office prepared the propounded instrument based on instructions that decedent gave him, and at his

request. Garabedian further testified that he received a copy of the September 2014 instrument[1] with mark ups reflecting changes, and that he subsequently had a series of conversations with decedent—in person and over the phone—to discuss the changes to the instrument that decedent wanted made.

According to Garabedian, on the morning of October 15, 2015, he went to the hospital to visit decedent and go over a few things related to the new will that decedent wanted Garabedian to draft. After confirming decedent's instructions, Garabedian drove to his office and had his staff draft the propounded instrument. Garabedian further testified that, due to a prior commitment, he was not available to supervise the execution of the propounded instrument and that his law partner (and wife), Janine Rayano, took care of the instrument's execution later that day. Garabedian testified that decedent was lucid when he saw him the day the instrument was executed.

As to the size of decedent's estate and the natural objects of his bounty, Garabedian testified that decedent's estate had remained substantially the same since 2013 when decedent became his client, at which time decedent had completed a questionnaire regarding his finances and other information relevant to estate planning. When asked by objectant's counsel whether Garabedian had anything in writing concerning the size of decedent's estate in 2015, Garabedian stated, "I don't have anything in writing that was contemporaneous with 2015. I'm basing it on the multitude of conversations that [decedent] and I had in the ensuing two years in person and over the phone."

1 At her deposition, Diane testified that decedent had asked her to go to his house to retrieve his will which was in a manila envelope and to bring it to him at the hospital. Diane did so and then, at decedent's request, she delivered the envelope to Garabedian. Diane testified that the envelope with decedent's will was sealed when she gave it to Garabedian.

Garabedian was asked whether decedent was under anyone's undue influence on October 15, 2015, and he answered, "I don't believe he was." Counsel countered, "what makes you say that?" Garabedian responded, "[Decedent] was a very strong-willed, intelligent person and I found him to be someone who did what he wanted to do in the manner that he wanted to do it[,] in the time frame he wanted to do things[,] and I tried to accommodate his wishes as best as possible."

In addition to the propounded instrument, in October 2015, Garabedian's office drafted a power of attorney for decedent in which he designated Diane as his agent. According to Garabedian, the instrument was drafted at decedent's request and after Garabedian met with Diane, who was, at the time, taking care of decedent's affairs.

Janine Rayano testified that, on October 15, 2015, she arrived at the hospital between 1 p.m. and 3 p.m. accompanied by her paralegal, Barbara Scelzi. Present in decedent's hospital room were decedent and Tiana Quintero, decedent's health aide. Rayano testified that she had asked Quintero if she would serve as a witness and Quintero had agreed to do so. Rayano further testified that she had asked decedent how he was feeling, and that decedent had said that he was tired. In response to questions posed to Rayano by objectant's counsel about decedent's appearance and mental status, Rayano stated, "he just looked weaker than he normally looked. Mental status, he answered the questions I asked him. As for any kind of condition medically, I couldn't tell you because I clearly don't know." Counsel then asked if decedent was coherent on October 15, 2015, in light of his having taken pain medication that day. Rayano responded: "I spoke to him, and he answered my questions, and he seemed to know what he wanted to do as far as the Will, and I proceeded based on that. I don't know what you mean by coherent, but he

seemed to understand the questions I was asking him and he gave me answers that led me to believe he knew what he was doing."

When asked if decedent was confused on October 15, 2015, Rayano stated, "not regarding anything I discussed with him, no, he didn't act confused. He knew where he was. He knew what day it was." With respect to the will, decedent "seemed himself" and he was lucid, according to Rayano. She further testified that she had asked decedent if any of the medications that he was taking impaired his ability to understand the contents of the will and sign it, to which decedent responded, "No." Rayano opined that, judging from the attention that decedent paid to his wills and the many conversations that she had had with decedent in the past concerning his property in Southampton, he knew, on October 15, 2015, the extent of his assets. Rayano also testified that she asked decedent to read the instrument to himself to make sure that it represented his wishes. Decedent read the instrument and confirmed to her that the same reflected the changes he had discussed earlier that day with Garabedian.

During her own SCPA 1404 examination, Quintero testified that, before decedent was hospitalized in October 2015, she observed him working on his will while he was receiving dialysis treatment one day. She also testified that Rayano had asked her to witness decedent sign his will. Upon questioning from objectant's counsel about the effect the pain medication had on decedent, Quintero stated, "If I thought he was the way he was after he would leave dialysis, when he was on medication, I would have never signed it or had been a witness. But he was talking that day, convers[ing]. He wasn't loopy, in and out of sleep. He was fine that day." Upon further questioning, Quintero testified that decedent had read the instrument in her presence. She also testified that she had heard decedent tell his attorney that he wanted to "take [a guy] out of the Will."

Quintero stated at her deposition that Diane and Diane's husband visited decedent in the hospital "many times" and that the hospital staff would call Diane whenever they wanted to speak with the family because Diane "was always the one that was there when [decedent] was sick at the time."

According to Rayano and Quintero, decedent signed his will in their presence. An Affidavit of Attesting Witness was signed by the two of them and was notarized by Scelzi on October 15, 2015. A little over one month later, decedent passed away at a nursing home where he had been sent for rehabilitation after being discharged from the hospital.

It is undisputed that decedent's health was compromised at the time the will was executed. The intake notes from his hospitalization on October 2, 2015, two weeks before the propounded instrument was executed, indicate that decedent had undergone surgery to remove a cancerous growth on his lung in the past. Those notes also indicate that decedent suffered from other medical conditions: end-stage renal failure, COPD, hypotension, coronary artery disease, diabetes, atrial fibrillation, gout, spinal stenosis, arthritis and cellulitis. It is also undisputed that decedent had complained from pain in the days prior to October 15, 2015, and that he was given Oxycodone to relieve his pain at 11:12 a.m. that day.

Nicholas admitted during his deposition that his relationship with decedent was strained and that decedent had not spoken to him in more than two years before he passed away. In September 2013, decedent and Audrey Couloumbis, decedent's sister-in-law, commenced an action against Nicholas in Queens County Supreme Court for partition concerning a property that decedent owned together with Nicholas and Audrey. That lawsuit was settled in September 2013.

## DISCUSSION

### Summary Judgment Standard

On a motion for summary judgment, the court must determine whether the movant has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212). Once this showing has been made, the adversary must try to demonstrate that a material issue of fact remains open and that a trial is therefore necessary (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the adversary fails to do so, the motion must be granted. Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such relief should be considered with caution (*see F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186,188 [1st Dept 2002]).

### Testamentary Capacity

The capacity required to execute a will is less than that required to execute other legal documents (*see Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], *affd* 307 NY 181 [1954] ["less capacity is required to enable one to make a will than to make other contracts"]). Capacity is evaluated by three factors: (1) whether the testator understood the nature and consequences of executing a will, (2) whether he knew the nature and extent of the property he was disposing of, and (3) whether he knew those who would be considered the natural objects of his bounty and his relations with them (*see Matter of Friedman*, 26 AD3d 723 [3d Dept 2006]; *Matter of Clapper*, 279 AD2d 730 [3d Dept 2001]; *Matter of Slade*, 106 AD2d 914 [4th Dept 1984]; *see also Matter of Kumstar*, 66 NY2d 691 [1985]), and is measured at the time of the will's execution (*Matter of Alibrandi*, 104 AD3d 1175, 1177 [4th Dept 2013]).

Here, proponents have made a prima facie showing of decedent's testamentary capacity at the time of the will's execution. The evidence shows that decedent himself sought out the services of Rayano & Garabedian, P.C., to revise his 2014 will which laid the ground work for the propounded instrument. Decedent spoke with Garabedian on more than one occasion a few days before the will's execution and on the day that the will was executed and provided counsel with specific detailed revisions.

In addition, Quintero, decedent's caregiver, testified that she saw decedent "working on his will," and that she heard decedent tell his lawyer that he wanted to make sure that someone was cut out of the will. Further, the attesting witnesses, Quintero and Rayano, the latter of whom also acted as supervising attorney, both testified that decedent was engaged during the execution process, and that he knew what he was doing. Their testimony makes clear that decedent appeared to have no cognitive difficulties which prevented him from understanding and appreciating the nature of the document he executed. Decedent's testamentary capacity is further supported by the self-proving affidavit of the attesting witnesses. Finally, the medical records concerning decedent's state of mind on the day the will was executed do not indicate any mental deficiency sufficient to call decedent's testamentary capacity into question.

As noted in other contested probate proceedings, "[t]here is a presumption of testamentary capacity when a will is drafted and the execution is supervised by an attorney, particularly when the evidence indicates that the [decedent] executed the will only after careful review and discussion of its contents" (*Matter of Feller*, 26 Misc 3d 1205[A], 2010 NY Slip Op 50001[U] [Sur Ct, Monroe County 2010] [citations omitted]). Under these circumstances, the court concludes that proponents have met their burden (*see Matter of Conti*, 5 Misc 3d 1026[A], 2004 NY Slip Op 51573[U] [Sur Ct, Bronx County 2004]). Objectant must now come forward

with proof in admissible form which establishes that a material issue of fact nonetheless remains open.

In opposition to summary judgment on the capacity issue, objectant presents no evidence. Instead he offers only his counsel's conclusion that decedent's ability to understand and appreciate the nature of the document he executed was severely diminished because decedent was "under the influence of strong pain and anti-psychotic medication," and suffering from the effects of low blood pressure and was "close to death." Those facts, however, do not establish that decedent lacked capacity on October 15, 2015, especially in light of the testimony of the three individuals who interacted with decedent that day and who averred that decedent understood what he was doing. Speculation alone is not a substitute for evidence and is insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981] [allegations by party opposing the motion must be "specific and detailed, substantiated by evidence in the record; mere conclusory assertions will not suffice"]).

Therefore, since objectant has submitted no competent evidence creating a genuine issue of fact as to decedent's capacity at the time the will was executed (*see Matter of West*, 147 AD3d 592 [1st Dept 2017]), the motion for dismissal of the objection as to capacity is granted.

Due Execution

The testimony of Rayano, the attorney who oversaw the will's execution, as well as the testimony of attesting witness Quintero, is evidence that the execution ceremony substantially complied with all the requirements of EPTL 3-2.1 (*Matter of Frank*, 249 AD2d 893, 894 [4th Dept 1998], *lv denied*, 92 NY2d 807 [1998]; *see also Matter of Thier*, 2012 NYLJ Lexis 1545 [Sur Ct, NY County 2012]). Moreover, the instrument contains an attestation clause and is

supported by Quintero's contemporaneous self-proving affidavit. Since the execution was supervised by an attorney, there is a presumption of regularity (*Matter of Kindberg*, 207 NY 220 [1912]; *Matter of Spinello*, 291 AD2d 406 [2d Dept 2002]). Under these circumstances, the court concludes that proponents have made their prima facie case for due execution.

Objectant's papers in opposition to proponents' motion are silent as to the objection of lack of due execution. Accordingly, objectant has failed to raise a question of fact as to due execution, and summary judgment is therefore granted dismissing that objection.

Undue Influence

The premise of an objection alleging undue influence is that the propounded instrument is the product of someone other than decedent (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]). It is proponents' task to establish prima facie that the propounded instrument is a natural will. Here, proponents have met that burden. Quintero testified that Diane was involved in decedent's care and visited him at the hospital. Thus, it is not unusual that decedent would want to provide for Diane in his will. Additionally, the testimony of attorney-drafter Garabedian and that of Quintero establishes that decedent intended to disinherit objectant. The record reflects that two years before the propounded instrument was executed, decedent was involved in litigation against objectant and that he was angry at objectant. Under these circumstances, it is natural that decedent would not want to benefit objectant under his will. In fact, decedent did not provide for objectant in three prior instruments either. The record before the court also reflects that the attorney-drafter did not communicate with Diane about the details of decedent's estate plan. Considering these facts, the court concludes that proponents have made a prima facie case that the propounded instrument reflected decedent's wishes and no one else's.

An objectant seeking to establish that an instrument is the product of undue influence must make a showing of three elements: motive, opportunity and actual exercise of undue influence (*see Matter of Fiumara*, 47 NY2d 845, 846 [1979]; *Matter of Panek*, 237 AD2d 82, 84 [4th Dept 1997]). Relying heavily on *Matter of Walther* (6 NY2d 49 [1959]), objectant argues that the propounded instrument is the product of Diane's actions and influence on decedent, who depended on her at a time in which he was too weak to resist Diane's pressure. In support of his argument that Diane had a motive to exercise undue influence, objectant points to the fact that Diane knew she was not provided for in the 2014 instrument and argues that she orchestrated the change to the last will to benefit herself and her daughter, who receives $100,000 if she attends graduate school.[2] According to objectant, the fact that Diane is a licensed attorney who "was very proactive in the preparation of this will and interfaced directly with the attorney draftsperson," or at the very least "clearly orchestrated its execution" together with the fact that decedent was fragile both physically and mentally and relied on Diane to take care of his needs provided Diane with the opportunity to exert undue influence. Finally, as to actual exercise of undue influence, objectant argues that the court should look at the totality of the circumstances surrounding the execution of the propounded instrument and conclude that the sudden and unexplained inclusion of Diane as one-third residuary beneficiary in decedent's testamentary instrument can only be the product of the exercise of such influence by Diane, who exploited her role as fiduciary and caregiver to cause decedent's will to be changed to benefit herself and to exclude objectant.

Objectant, however, offers no evidence that, proponents— or any anyone else for that matter— took any action of a substantial nature that unduly influenced decedent to dispose of his property in a manner inconsistent with his wishes. Instead, the uncontroverted evidence before

2 In the September 2014 instrument, Diane's daughter gets $25,000 if she were to pursue graduate studies.

court establishes that it was decedent himself who sought out the services of Garabedian to revise his 2014 will which laid the ground work for the propounded instrument and that he discussed the specific revisions to the 2014 instrument with Garabedian a few days before the execution ceremony as well as on the day of execution. As to objectant's claim that Diane interfered by suggesting the insertion of terms beneficial to her and her daughter, again, objectant offered no proof in support of this contention. Nor is there any support on the record for objectant's assertion that Diane "orchestrated" the execution of the will.

In a further attempt to create a question of fact, objectant also submits that a confidential relationship existed between decedent and Diane simply by Diane being asked by decedent to essentially serve as a "go between" between himself and his attorney, and because decedent was dependent on Diane for his care. Even accepting as true, for the sake of argument, that Diane was in a confidential relationship with decedent, the existence of that relationship, without more, does not create such an inference. In fact, no inference of undue influence arises where, as here, "there is no evidence that the fiduciary-legatee . . . had any direct or indirect involvement in the preparation or execution of the testamentary instrument[ ] offered for probate" (*Matter of Bartel*, 214 AD2d 476, 477 [1st Dept 1995]; *see Matter of Colby*, 240 AD2d 338 [1st Dept 1997]). Garabedian testified that he did not discuss the specific changes that decedent wanted to make on his will with Diane, and that those changes were communicated to him by decedent himself. Further, the power of attorney appointing Diane as decedent's agent could not have provided the basis for the existence of a confidential relationship between decedent and Diane because that power of attorney was executed a few days after the October 15, 2015 execution of the propounded instrument.

The court notes that the affirmation of objectant's counsel in opposition to proponents' motion contains many of counsel's own conclusions—such as his suggestion that Diane was "possibly present" when the propounded instrument was executed, or that there is no basis for excluding objectant, "a loving and caring nephew" as a beneficiary of decedent's will, or that the attorney-drafter never "interfaced" with decedent directly—for which there is no support on the record. In any event, counsel's affirmation carries no weight in the determination of the issues in the instant motions since, affirmations cannot serve as evidence where, as here, the lawyer does not purport to speak from personal knowledge (*see Matter of Davidovich*, NYLJ, June 4, 2018, at 18, col 3 [Sur Ct, NY County 2018]; *citing Zuckerman v City of New York*, 49 NY2d at 563). The court must assess the "witnesses' actual words as they appear in the record" and is not bound to rely on counsel's interpretation and selection of the witnesses' deposition testimony (*Matter of Davidovich*, *supra*).

Finally, objectant argues that greater scrutiny should be afforded to the propounded instrument because Diane, an attorney, was involved in its preparation and Diane and her family are beneficiaries. For this proposition, objectant relies on *Matter of Putnam* (257 NY 140, 143 [1931]), and its often quoted language: "the lawyer who drafts himself a bequest [is required] to explain the circumstances and to show in the first instance the gift was freely and willingly made." Objectant's reliance on *Putnam*, however, is misguided. Uncontroverted evidence on the record reflects that, while Diane holds a law degree, she has not practiced law since the 1990s and works now as a guidance counselor for the New York City Department of Education. In addition, as previously mentioned, there is absolutely no evidence on the record to support the conclusion that Diane drafted the propounded instrument. More importantly, as *Putnam* itself makes clear, the wills that are viewed with "great suspicion" are those which include a gift for an

attorney-drafter who bears no familial relationship with the testator. This is not the case here. The propounded instrument favors decedent's closest family members and excludes only one with whom decedent had a strained relationship.

Other arguments by objectant such as his suggestion that the court should be suspicious of the circumstances of the propounded instrument's execution because family members did not know that decedent was executing a new will or that the instrument's disposition of one-third of the residuary to Diane is unnatural or unjust are either irrelevant to the issues at heart or not supported by the record. In any event, these arguments fail to raise a material issue of fact.

In sum, conclusory allegations and speculation, which are all that objectant offers in support of his undue influence objection, are insufficient to defeat a motion for summary judgment (*see, e.g.*, *Matter of Korn*, 25 AD3d 379 [1st Dept 2006]; *Matter of Young*, 289 AD2d 725, 727 [3d Dept 2001]). Consequently, given the absence of any evidence to support his claim that the propounded instrument reflects Diane's wishes and not decedent's, the court concludes that objectant has failed to raise a triable issue of fact. Accordingly, proponents are entitled to summary judgment dismissing the objection relating to undue influence.

Fraud

Proponents have met their burden of showing prima facie, as they did with the objection of undue influence, that the propounded instrument is a natural will and not the product of fraud. To raise a material issue of fact, objectant must show, by clear and convincing evidence, that a false statement or promise was made to the testator which caused the testator to execute a will disposing of his property differently than he would have in the absence of such misrepresentation (*Matter of Ryan*, 34 AD3d 212, 215 [1st Dept 2006]). Here, objectant has failed to plead the elements of his claim with particularity as required by CPLR 3016(b). In addition, in his papers

in opposition to proponents' motion, objectant failed to address the fraud objection. Therefore, that objection is deemed abandoned and is dismissed.

CONCLUSION

Based on the foregoing, proponents' motion for summary judgment dismissing Nicholas Christopher's objections based on lack of due execution, lack of testamentary capacity, undue influence and fraud, is granted, and the October 15, 2015 instrument will be admitted to probate. It follows that objectant's cross-motion dismissing the probate petition is denied.

Settle Decree.

Dated: October 12, 2018

SURROGATE