Matter of Johnson
2018 NY Slip Op 33230(U)
November 26, 2018
Surrogate's Court, Nassau County
Docket Number: 2015-386060/A
Judge: Margaret C. Reilly

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

DAISY MAE JOHNSON, a/k/a Daisy Johnson, a/k/a Daisy M. Johnson,

Deceased.
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DECISION & ORDER

File No. 2015-386060/A
Dec. No. 34636

PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion, Affirmation, Affidavits and Exhibits. 1

In this probate proceeding of the estate of Daisy Johnson ("decedent"), Delma Harris, this sister of the decedent ("objectant"), moves by notice of motion for summary judgment (a) dismissing the petition for probate and letters testamentary brought by Malvia Roberts ("petitioner") pursuant to CPLR 3212; and (b) denying the purported will to probate. The motion is unopposed.

Background

The decedent died a resident of Nassau County on November 11, 2014 and was survived by three of her eleven brothers and sisters and the children of two of her predeceased siblings, as well as distributees whose whereabouts are unknown and for whom a guardian ad litem ("GAL") has been appointed. The GAL took no position on the instant motion. The decedent's spouse predeceased her and she had no children. The petitioner is the daughter of one of the decedent's surviving sisters. Petitioner filed a probate petition on

September 18, 2015. [1] SCPA 1404 examinations were scheduled for December 14, 2017. The objectant provided a copy of the transcript of the default. The transcript indicates that the attorney for the petitioner failed to appear and did not produce any witnesses. Objections were filed on or about December 22, 2017.

Summary Judgment

"[T]he proponent of a summary judgment motion must make 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]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr*, 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). Summary judgment in contested probate proceedings may be appropriate where the objectant fails "utterly to show any deficiency in the form of the [decedent's] will" (*Matter of Posner,* 160 AD2d 943, 944 [2d Dept 1990]), fails to raise a triable issue of fact with regard to testamentary capacity (*Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]), or fails to raise triable issues of fact regarding the separate claims of undue influence and fraud (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]).

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[1] Objectant states amended petition was "submitted" and provides a copy of same as an exhibit. The court file does not contain an amended petition.

Due Execution

The proponent has the burden of proof on the issue of due execution (*Matter of Moskowitz*, 116 AD3d 958 [2d Dept 2014]). EPTL 3-2.1 provides, in part:

> "(a) . . . every will must be in writing, and executed and attested in the following manner:
>
> (1) It shall be signed at the end thereof by the testator . . .
>
> (2) The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction . . .
>
> (3) The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will.
>
> (4) There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will . . . "

The presence of an attestation clause and a self-proving affidavit gives rise to a presumption that the statutory requirements were satisfied (*Matter of Malan,* 56 AD3d 479 [2d Dept 2008]). The will offered for probate contains both an attestation clause and self-proving affidavit. Also, where an attorney drafter supervises the will's execution, "there is a presumption of regularity that the will was properly executed in all respects" (*Matter of Finocchio*, 270 AD2d 418, 418 [2d Dept 2000]).

In the instant proceeding, the witnesses to the will were not produced for SCPA 1404 examinations and did not provide SCPA 1406 affidavit(s) of attesting witness (es) out of

court. The affidavit of witnesses annexed to the will is devoid of a date that the witnesses witnessed the execution. The petitioner did not provide any proof that the witnesses were present for the execution of the purported will, that they read the attestation clause or that the decedent executed the document in accordance with EPTL 3-2.1.

Summary judgment as to due execution is **GRANTED.**

Testamentary Capacity

The proponent also has the burden of proving testamentary capacity (*Matter of Kumstar*, 66 NY2d 691 [1985]). This burden may be met by "establishing that the decedent understood the nature and consequences of making the will, the nature and extent of his or her property, and the natural objects of his or her bounty" *(Matter of Sabatelli,* 161 AD3d 872, 874 [2d Dept 2018]). Less mental faculty is required to execute a will than any other instrument (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], *affd* 307 NY 181 [1954]; *Matter of Fish,* 134 AD3d 44 [3d Dept 1987]). Mere proof that the decedent suffered from physical infirmity is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845 [1979]) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made and executed (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). "Until the contrary is established a testator is presumed to be sane and have sufficient mental capacity to make a valid will" (*Matter of Scher,* 20 Misc 3d 1141[A][Sur Ct, Kings County 2008], citing *Matter of Betz,* 63 AD2d 769 [3d Dept 1978]).

The petitioner did not present testimony or any proof that the decedent had testamentary capacity at the time of the execution of the purported will.

Summary judgment as to testamentary capacity is **GRANTED.**

Accordingly, the petition for probate is **DISMISSED.**

The GAL did not file a GAL report or opposition to the instant motion. The GAL is hereby directed to file an affidavit of legal services within ten (10) days of the date of this decision.

Settle decree.

Dated: November 26, 2018
Mineola, New York

E N T E R:

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

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