

## TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

### *Revisiting Summary Judgment in Probate Proceedings*

Several years ago, my colleagues as New York Law Journal columnists, Colleen Carew and Charles Gibbs, wrote on the use of summary judgment in contested probate proceedings.<sup>1</sup> Their commentary noted that while summary judgment is generally a drastic remedy; in probate proceedings it was becoming an oft-utilized remedy to avoid a trial in circumstances in which no genuine issue of fact existed.

Since the writing of that article, the willingness of surrogates to grant summary judgment in probate proceedings has continued, as reflected in the recent opinions discussed below.

In addition to the foregoing, decisions of interest have been rendered pertaining to the issue of standing in discovery proceedings, and witness-beneficiaries under a propounded will.

#### **Summary Judgment Affirmed on Appeal**

In *Matter of Tuccio*, the Appellate Division affirmed an Order of the Surrogate's Court, Suffolk County, which granted summary judgment in petitioner's favor and dismissed the objections to probate.

The court found that the Surrogate's Court properly dismissed the objections alleging lack of due execution, particularly in view of the fact that the attorney-draftsperson supervised the will's execution. The court held that the objectant failed to rebut the presumption of regularity that arises under such circumstances, or to raise a triable issue of fact relating to the genuineness of the decedent's signature on the instrument.

In addition, the court held that the Surrogate's Court properly dismissed the objections regarding the decedent's capacity, finding that the objectant had failed to raise a triable issue of fact in opposition to petitioner's proof that the decedent was alert at the time he executed his will, that he knew the nature and extent of his property, and that he was aware of the natural objects of his bounty.

*Matter of Tuccio*, NYLJ, March 26, 2007, p. 35 (A.D. 2d Dept.).

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#### **Due Execution, Testamentary Capacity**

• *Summary Judgment Granted on Issues of Due Execution, Testamentary Capacity and Fraud*

In a contested probate proceeding, the petitioners moved for summary judgment dismissing the objections to probate of the propounded instrument.

The will offered for probate was undated and nominated the decedent's three siblings as executors. In pertinent part, the objectants, who were the decedent's children, maintained that because the document was undated, it was a nullity. In addition, they alleged that the will was not duly executed, that the decedent lacked testamentary capacity on the date of its execution, and that it was procured by the fraud and undue influence of the decedent's parents and siblings.

On the issue of due execution, the objectants alleged that the decedent failed to properly subscribe the document in the presence of the attesting witnesses or acknowledge to those witnesses that the instrument was his will. The objectants also claimed that while the witnesses to the instrument provided affidavits as to when the instrument was executed, they failed to state where it was executed. Further, they pointed to the fact that the draftsperson of the document was the decedent's brother, that the decedent's father was in the room at the time of execution, and that the execution of the instrument was supervised by a paralegal.

The petitioners argued that the testimony of the supervising paralegal and witnesses confirmed that the instrument was duly executed, and that the only allegations raised to counter

that conclusion were that the instrument was not read aloud, that it was not bound at the time of its execution, and some speculation that the decedent failed to wear reading glasses when he signed the document.

The court held that because the execution of the instrument was not supervised by an attorney, there could be no presumption accorded to the due execution of the document. Nevertheless, the court found that the testimony of the witnesses revealed that the decedent signed the instrument at the end thereof, in their presence, and declared the document to be his will, all in accordance with the statutory formalities. Moreover, regarding the objectants' allegations that the will was not stapled when signed, the court found that the paralegal who supervised the execution had testified that she had stapled the instrument prior to its signing, that the instrument appeared in a logical sequence, and that only slight evidence is needed to demonstrate that the document was fastened in some permanent form. Accordingly, summary judgment on the issue of due execution was granted.

The court also granted summary relief on the issue of testamentary capacity. While the evidence revealed that the decedent was quite ill, mentally and physically, in the weeks prior to his death and the execution of the document, the hospice care personnel who attended to his care, and the attesting witnesses, all testified that he was lucid and alert at the time the will was signed. Specifically, the attesting witnesses stated that the decedent possessed the requisite capacity to execute the document.

The court said that less capacity is required to execute a will than any other legal instrument. As such, infirmities, such as those suffered by the decedent, did not, standing alone, suffice to establish a person's inability to make a will. Further, although objectants' argued that the decedent lacked capacity because he was under the impression that he did not own a parcel of property that had been mortgaged, the court found that a testator is only required to have a general understanding of his real and personal property at the time he executes his will.

Finally, the court held that the objectants failed to support their claim that the propounded document was the result of fraud and granted summary judgment on this issue in the petitioners' favor as well.

However, the court concluded that summary judgment was not warranted on the issue of

undue influence given the fact that the decedent was suffering from end-stage cancer at the time the will was signed, he had recently moved into his parents' home, the will was executed in close proximity to the decedent's death, and his brother prepared the document which represented a change from a prior testamentary scheme.

*In re Estate of Spataro*, NYLJ, March 19, 2007, p. 38 (Surrogate's Court, Suffolk County) (Surr. Czygier).

## Triable Issues of Fact

### • Summary Judgment Granted; Record Devoid of Triable Issues of Fact

The decedent died survived by three children. At the time the propounded will was executed, there were two children of a pre-deceased son then alive, namely, the objectant and his sister. In that will, the decedent provided for \$10,000 bequests to the objectant and his sister, or the survivor of them. Objectant's sister subsequently died. Other than these bequests and a few non-family and charitable bequests, the propounded will left her entire estate equally to her three daughters and named one of them as well as her son-in-law as co-executors.

The objections to probate alleged lack of due execution, lack of testamentary capacity, undue influence and fraud. The petitioners moved for summary judgment.

In support of the due execution of the instrument, the petitioners submitted the affirmation of the attorney-draftsperson, who stated that he supervised the will execution, and, together with his wife, witnessed the signing of the document at the decedent's request. Further, the attorney's affirmation stated that the instrument was executed in accordance with the statutory formalities. The court said that where an attorney supervises the execution of a will there is a presumption of due execution. Inasmuch as the objectant had not submitted any proof to rebut this presumption, summary judgment on the issue of due execution was granted.

In support of the decedent's testamentary capacity, the petitioner offered the affidavits of the attesting witnesses, which were executed contemporaneously with the will, and which stated that the decedent was of sound mind. In addition, one of the proponents submitted an affidavit detailing entries made in the decedent's diary at or about the time the will was executed, which reflected her ability to manage her schedule, pay her own expenses, and handle complex financial transactions. Moreover, the decedent's checkbook at this time revealed that she was aware of her family members, and the natural objects of her bounty, inasmuch as she had written checks as gifts to her children and grandchildren, including the objectant and his children. Finally, the decedent's housekeeper of 11 years submitted an affidavit wherein she stated that the decedent was alert, totally conversant and in charge of all her family, social, medical and financial affairs.

In sharp contrast to the foregoing, the objectant failed to offer a scintilla of evidence that the

decedent suffered any mental impairment that would jeopardize her capacity to execute the propounded will.

Similarly, on the issue of forgery, the court found that the objectant failed to produce any competent evidence from an expert or other person familiar with the decedent's handwriting that would indicate that the signature on the subject will was not that of the decedent.

Finally, as to the issues of fraud and undue influence, the objectant maintained that the decedent was mistaken at the time of her death as to the value of the family business in which her husband and predeceased son were involved, and more specifically, because she thought it was successful, she did not leave anything in her will for her son or his family. Further, the objectant claimed that the will was the result of undue influence because the attorney-draftsperson thereof was well-known to the proponents.

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The court held that when mistake is alleged, probate will be denied when it is of such a character as to affect the decedent's testamentary intentions, and reflects the intentions and acts of the influencing party. Within this context, the court found that the objectant's contentions regarding the decedent's mistake as to the value of the business were speculative and insufficient to sustain his claim of undue influence. Furthermore, as to the issue of the attorney-draftsperson, the evidence revealed that the attorney was a good friend of the family, that her husband previously used him for legal matters, and that he had been selected because the attorney who had drafted the decedent's prior will was very ill at the time the propounded will was prepared and executed, unable to practice law, and died shortly thereafter. Moreover, the court found it significant that at the time the will was executed, the proponents were in Florida. Accordingly, the court dismissed the objections as to fraud and undue influence.

*In re Estate of Greene*, NYLJ, Oct. 19, 2006, p. 33 (Surrogate's Court, Kings County) (Surr. Torres)

## Discovery Proceeding

### • Standing to Pursue a Discovery Proceeding

In a proceeding to set aside a deed, the defendant moved to dismiss the action pursuant to CPLR 3211(a)(10) on the grounds that the plaintiff failed to join a necessary party.

The decedent died on July 27, 2003 survived by two daughters. One of the decedent's daughters sought probate of her will. Prior to the probate of the instrument, the daughter, in her individual

capacity, instituted an action against her sister to invalidate the subject deed.

The court granted the defendant's motion to dismiss the complaint not only on the ground that the plaintiff had failed to join the estate of the decedent as a necessary party, but also on the ground that the plaintiff lacked standing in her individual capacity to bring the action. The court held that a nominated executor, charged with the duty of recovering property of the estate, has no independent cause of action for the recovery of such property.

*In re Estate of McMahon*, NYLJ, March 29, 2007, p. 31 (Surrogate's Court, Queens County) (Surr. Nahman)

## Lost Bequest

### • Witness-Beneficiary Loses Bequest/Notary Public Denied Status as Attesting Witness

At issue in an uncontested probate proceeding was whether the disposition to the decedent's sister was void on the grounds that she was one of the two attesting witnesses to the execution of the propounded instrument.

In order to salvage the bequest, the petitioner requested the court to determine that the attorney who notarized the self-proving affidavit annexed to the will be treated as an attesting witness. In support thereof, the petitioner relied on "notary cases" which hold that where a proposed attesting witness signs a will as a notary public, inquiry should be made to determine whether the notary signed merely in that capacity or as a witness to the execution of the document at the request of the testator.

In response to these opinions, the court took the testimony of the second attesting witness and the attorney. While the testimony of the witness regarding the execution of the instrument was vague, the attorney was clear that the testator did not ask that he serve as a witness to the execution of her will, and that he only signed the instrument as a notary public.

Based upon the foregoing, and the provisions of EPTL 3-2.1(a)(4), the court held that the testimony of the decedent's sister was needed to prove the propounded instrument. Accordingly, the court declared her bequest under the will void pursuant to the provisions of EPTL 3-3.2, and limited her interest in the estate to her share in intestacy.

*In re Estate of Margolis*, NYLJ, Feb. 23, 2007, p. 32 (Surrogate's Court, New York County) (Surr. Roth).

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1. Colleen Carew and Charles Gibbs, "On the Increased Granting of Summary Judgment in Will Contests," NYLJ, Aug. 17, 2001, p. 3.