Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective

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A motion for summary judgment, pursuant to CPLR § 3212 or § 3211, is a powerful procedural tool that can end litigation immediately.

Summary judgment can deliver a swift and decisive victory on the outcome of a matter. It can limit the issues, or award the broadest types of relief by ending all claims. When granted, it can avoid years of potential litigation and expense.

But for all of its versatility, drafting a motion for summary judgment can be a daunting and complex undertaking. The facts (hopefully none in question), and the applicable law in every matter can make it difficult to identify issues with no triable issue of fact. Communicating them clearly to the Court so as to show that summary judgment should be granted is the challenge.

However, estate litigation can be surprisingly well suited to determinations based on summary judgment, which should not be forgotten by the proponents who finds themselves in a Will contest before a Surrogate. This is largely due to the fact that contested estates which reach the point of full blown litigation are almost always based on one, a combination of, or all of the familiar objections to testamentary validity: the failure to duly execute the instrument pursuant to Estates Powers and Trusts Law (EPTL) § 3-2.1, that testator lacked testamentary capacity, or that the instrument was a product of undue influence or fraud.

Though summary judgment can only be granted where the movant makes 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,"[1] this is by no means an insurmountable task, even in matters where it appears that issues of fact dominate the proceeding. This is especially true in Surrogate's Court where the traditional, general aversion for granting summary judgment has been eroded over the last several years.

Indeed, a Probate petitioner in Surrogate's Court holds a number of procedural advantages over an objectant when making a motion for summary

judgment to dismiss objections, several of which are described in greater detail below.

Due Execution

From a proponent's perspective, the issue of due execution is perhaps best suited for summary judgment. After all, the requirements for due execution are articulated in EPTL § 3-2.1 clearly, and are often complied with by even the most novice of draftsmen, making it a particularly attractive issue for summary judgment relief where a failure to duly execute objection has been alleged.

It is well established that the initial burden of proof regarding due execution is on the proponent. The "party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, that the instrument was duly executed."[2] To establish due execution, a proponent must show that: "(i) the testator's signature is present at the end of the instrument; (ii) the testator has either signed the instrument in the presence of at least two attesting witnesses, or acknowledged his/her signature to them; (iii) the testator declared to each of the attesting witnesses that the instrument was his/her will; and (iv) the witnesses signed the instrument at the testator's request."[3]

This is by no means a heavy burden for a proponent, as it must only be proved by a preponderance of the evidence.[4] Furthermore, a proponent is afforded a number of favorable presumptions regarding due execution. Primarily, if the instrument was signed under the supervision of an attorney, it is presumed valid. Additionally, "Where a propounded instrument contains an attestation clause, it is inferred that the requisite statutory requirements were satisfied."[5] Lastly, case law shows that only substantial, not strict, compliance with EPTL § 3-2.1 need be present.

Any alleged failure to comply with the strict and literal terms of the statute is not a basis for dismissing the Petition for probate, and is insufficient to make a showing that a Will was not duly executed. The Court may find that substantial compliance with the statute is in fact sufficient to establish due execution. Furthermore, compliance with EPTL § 3-2.1's requirements may be found by

inference from the conduct and circumstances surrounding execution of the Will.[6]

Testamentary capacity

When determining testamentary capacity, the Court will consider the following factors: "(1) whether [s]he [the Testator] understood the nature and consequences of executing a will [or codicil]; (2) whether [s]he knew the nature and extent of the property she was disposing of; and (3) whether [s]he knew those who would be considered the natural objects of [her] his bounty and [her] his relations with them."[7] Accordingly, when moving for summary judgment, it is the proponent's task to prove, that as a matter of law, testator was legally capable of executing the instrument.

As with due execution, proponent has the burden of proving testamentary capacity by a preponderance of the evidence,[8] but is also afforded the benefit of several presumptions in their favor. "Until the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will."[9] Another factor in proponent's favor is that The Testator's testamentary capacity is assessed at the precise time of the propounded instrument's execution.[10] Additionally, a Testator needs only a lucid interval of capacity to execute a valid Will, and this interval can occur contemporaneously with an ongoing diagnosis of mental illness, including depression.[11] Moreover, Courts have consistently recognized that the existence of Self-Proving Affidavits executed by the attesting witnesses creates a presumption of testamentary capacity.[12] Each of these presumptions can be used with great effect to prove testamentary capacity, and make the task of a proponent significantly easier to meet their burden, absent of course an objectant's valid rebuttal.

Undue Influence

Unlike due execution and testamentary capacity, objectant has the burden of proof to establish that a testamentary instrument was procured by undue influence.[13] To establish undue influence, an objectant must demonstrate, by a

preponderance of the evidence, “that the influencing party had a motive to influence, the opportunity to influence, and that such influence was actually exercised.”[14] This influence must have been so strong and pervasive that it subverted the true intentions of the testator at the time of execution to the extent that, but for the undue influence, the testator would not have executed the instrument. Clearly, this is a rather high standard to prove. At a minimum, the objectant must make a showing of actual acts of undue influence, including proof of “time and places when and where such acts occurred.”[15]

It is no surprise with the requirement to prove the actual exercise of undue influence, that it is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence of a substantial nature.[16] Among the factors the Surrogates consider when determining if undue influence prevents the probate of an instrument are: “(i) the testator's physical and mental condition; (ii) whether the attorney who drafted the propounded instrument was the testator's attorney; (iii) whether the propounded instrument deviates from the testator's prior testamentary plan; (iv) whether the person who allegedly wielded undue influence was in a position of trust; and (v) whether the testator was isolated from the natural objects of his bounty.”[17] Often, an objectant will fail to offer evidence of any “actual acts” of undue influence at all, much less a single example raising an inference sufficient to meet the burden of proof to establish a *prima facie* case.

As further illustrated in the matter of the Will of Julia Elizabeth Taschereau,[18] decided in 2010 by the New York County Surrogate’s Court, actual and specific acts of undue influence can be difficult to establish. Taschereau offers a lengthy discussion about the nature of evidentiary burdens an objection to probate based on the allegation of undue influence must meet, albeit from a successful objectant’s position. In the Taschereau decision, Surrogate Webber provides a detailed breakdown of the above elements and takes great care in analyzing the facts of the case within their framework. The case involved twin sisters battling over their mother’s Estate, whose primary asset was a co-op in Manhattan valued at approximately $475,000. Proponent

lived near her mother, and Objectant resided in France. Both had a history of animus to each other from the time they were children, a fact well known amongst the testifying witnesses. Proponent petitioned the Court to probate a Will, leaving Testatrix's Estate to Proponent, one day after her mother's death. This Will contained significant changes from her prior Will, which left her Estate to her daughters equally, and it was signed while recovering from ill health at the insistence of Proponent.

The Court determined that shortly before her death, Testatrix had health problems which made her dependant on Proponent; Proponent had Power of Attorney; managed Testatrix's finances; and was increasingly dependant upon Testatrix for financial assistance. Additionally, testimony was admitted into evidence that showed Proponent would threaten to deny Testatrix visitation of Proponent's children, to whom she was devoted, when Testatrix would provide financial assistance to Objectant, or allow Objectant to stay at the co-op during visits from France.

Circumstantial evidence, drawn from this long and detailed family history of strife between the sisters and their relationship with the decedent, formed the basis of a reasonable inference that undue influence occurred. However, its lessons must not be lost on a petitioner seeking summary judgment in dismissing such an objection. This is because objectant's burden is set rather high. In Taschereau, this burden was met as there was an abundance of credible testimony from many close friends of the decedent, coupled with inconsistent and self-serving testimony from the objectant which in the words of the Court, sought "to manipulate the record."[19] In sum, the facts, and wealth of credible, corroborated and multisource testimony, which led to the inference that undue influence took place, that were present in Taschereau are uncommon. A petitioner can leverage the absence of facts such as those present in Taschereau to their advantage when arguing that an objection based on Undue Influence should be dismissed when moving for summary judgment.

FRAUD

The objectant also bears the burden of proof by clear and convincing evidence when establishing a *prima facie* case regarding the exercise of fraud in the procurement of an instrument.[20] In order to state a claim for fraud and defeat a motion for summary judgment on that issue, the objectant must show that there is an issue of fact to the extent that the proponent or a third party "knowingly made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement."[21] Evidence of actual misrepresentation is necessary; a showing of "motive and opportunity" to mislead is insufficient.[22] Importantly, "Mere conclusory allegations and speculation" are insufficient for an objectant to establish a *prima facie* case;[23] "Allegations must be specific and detailed, substantiated by evidence in the record.[24] In order to state a valid claim for fraud, the objectant must demonstrate that someone "knowingly made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement"[25] Again, these can be very difficult allegations to substantiate. The lack of specific examples offered by an objectant must be made clear in petitioner's motion, as without such examples, objectant's argument must be dismissed.

STANDING

Standing is a somewhat overlooked avenue for a successful summary judgment motion to make on behalf of a petitioner. As with all litigated matters, the parties to an action must establish that they have the right to be heard before the Court regarding the case at bar. Without the proper standing, a party cannot stand and be heard before the Court. The Second Department decision Matter of Abady [26] in 2010, is a recent example of a petitioner successfully dismissing objections for an objectant's lack of standing before the Surrogate. Objectant, the surviving spouse of decedent, filed objections to probate and notice of election. Petitioner moved for summary judgment pursuant to CPLR § 3211(a) to dismiss

on the grounds that she had no standing due to the fact that she waived her right to any claims against the estate in two prenuptial agreements, one executed in 2001 and the other in 2006. Cleverly, objectant sought to prove the prenuptial agreement invalid, arguing that it had not been properly acknowledged, and that its execution was procured as a product of fraud.

The Appellate Division, Second Department, determined that the execution of the prenuptial waiver "substantially complied"[27] with the standards set forth in the Real Property Law, and by extension, the requirements of EPTL § 5-1.1-A (e) (2) which provide: a waiver or release of a surviving spouse's right to an elective share of the estate of a deceased spouse "must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of the conveyance of real property."[28]

Furthermore, as the Abady Court pointed out, "[T]here is no requirement that a certificate of acknowledgement contain the precise language set forth in the Real Property Law. Rather, an acknowledgement is sufficient if it is substantial compliance with the statute.'"[29] Thus, decedent's signature was not required on the waiver, as objectant had argued, since the waiver was "unilateral in form," both signatures being required only where the waiver was "bilateral in form" pursuant to EPTL § 5-1.1-A(e)(3)(C). In the end, petitioner's motion for summary judgment to dismiss the objections was granted as the waiver was properly executed and thus denied the objectant standing.

Estate litigators should bear these key elements of summary judgment in mind the next time they are confronted with an objectant's claims. The presumptions in favor of petitioner, and heavy burden of proof upon objectant, make summary judgment a tactic that must be considered by a petitioner in order to counteract many common types of objections. Mere "speculation" and "conclusory allegations"[30] are not sufficient to raise triable issues of fact as many desperate objectants claim, but they are really "wailing and gnashing of teeth"[31] and are at best only unfounded attempts to make their hoped for theories be presented as factual questions, when that is not the case.

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[1] Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); see generally Friends of Animals v. Associated Fur Mfs., Inc., 46 N.Y.2d 1065 (1979).
[2] Rollwagen v. Rollwagen, 63 N.Y. 504, 517 (1876).
[3] Matter of Hirschorn, 11/5/2008 N.Y.L.J. 36, (col. 3) (Sur. Ct. Westchester County) citing Matter of Kelum, 52 N.Y. 517 (1873).
[4] Matter of Pirozzi, 238 A.D.2d 833.
[5] Matter of Hirschorn, 11/5/2008 N.Y.L.J. 36, (col. 3) (Sur. Ct. Westchester County).
[6] See Matter of Frank, 249 A.D.2d 893 (4th Dept. 1998).
[7] In re Kumstar, 66 N.Y. 2d 691 (1985).
[8] See Estate of McCloskey, 307 A.D. 2d 737 (4th Dept. 2003).
[9] See Matter of Beneway, 272 A.D. 463 (3rd Dept. 1947).
[10] See Matter of Minasian, 149 A.D. 2d 511 (2nd Dept. 1989)
[11] See Matter of Esberg, 215 A.D. 2d 655 (2nd Dept. 1995).
[12] See Matter of Castiglione, 40 A.D. 3d 1227, 1228 (3rd Dept. 2007)
[13] See Matter of Bustanoby, 262 A.D. 2d 407, 408 (2nd Dept. 1999).
[14] Matter of Malone, 46 A.D. 3d 975 (3rd Dept. 2007)
[15] Matter of Friedman, 26 A.D. 3d 723 (3rd Dept. 2006); see Matter of Fiumara, 47 N.Y. 2d 845 (1979).
[16] See Matter of Walther, 6 N.Y. 2d 49 (1959); Matter of Burke, 82 A.D. 2d 260 (2nd Dept. 1981).
[17] Estate of Hirschorn 11/5/2008 N.Y.L.J. 36, (col. 3) (Sur. Ct. Westchester County).
[18] Will of Julia Elizabeth Taschereau, NYLJ 1202474902148 at *1, (NY Surr 2010)
[19] Ibid.
[20] Simcuski v. Saeil, 44 N.Y. 2d 442, 452 (1978).
[21] Matter of Evanchuk, 145 A.D. 2d 559, 560 (2nd Dept. 1988).
[22] Matter of Gross, 242 A.D. 2d 333, 334 (2nd Dept. 1997).
[23] Matter of Seelig, 13 A.D. 3d 776, 777 (3rd Dept. 2004).
[24] Matter of O'Hara, 85 A.D.2d 669, 671 (2nd Dept. 1981).
[25] Matter of Bianco, 195 A.D. 2d 457 (2nd Dept. 1993).
[26] In re Abady, 76 AD3d 525, 526 (2nd Dept. 2010).
[27] Ibid.
[28] Ibid.
[29] Weinstien v Weinstien 36 AD 3d 797, 798 (2nd Dept. 2007).
[30] See generally Matter of Seelig, 13 A.D. 3d 776 (3rd Dept. 2004).
[31] Book of Matthew 13:42