Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY
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Probate Proceeding, Will of

UNA KEENE, a/k/a
UNA K. KEENE,

File No. 2013-4895

Deceased.
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By decision of this Court dated February 23, 2015, this matter was set down for a hearing to determine whether decedent’s will was duly executed and that, at the time of execution, decedent was in all respects competent to make a will and not under restraint (SCPA 1408). The instrument in question dated October 3, 2007 was not attorney supervised and it bequeaths the substantial portion of decedent’s estate to a caretaker to the exclusion of decedent’s distributees.

The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements of EPTL 3-2.1 (a) (*Matter of Rottkamp*, 95 AD3d 1338, 1339) by a preponderance of the evidence (*Matter of Halpern*, 76 AD3d 429, 431). In this case, the rebuttable presumption that the instrument offered for probate was duly executed does not apply because its execution was not attorney supervised (*cf. Matter of James*, 17 AD3d 366, 367; *Matter of Finocchio*, 270 AD2d 418).

At the hearing on March 25, 2015, petitioner submitted written applications seeking to dispense with the testimony of the two attesting witnesses to the will, David Mambwe and Chishimba Chileshe.

The Court may dispense with the testimony of any attesting witness who cannot with due diligence be found within the State (SCPA 1405 [1]).

Upon the evidence submitted, the Court is not satisfied that due diligence has been exercised proving that Chishimba Chileshe and David Mambwe can not be located in the State. Although the affidavit of due diligence with respect to Chishimba Chileshe describes three attempts to serve her with a judicial subpoena to compel her testimony (during non-business and business hours), the affidavit with respect to David Mambwe only describes one attempt to serve him. With respect to efforts to locate both of these witnesses, the photocopy of the investigative report produced by “AAY Associates” is not signed or acknowledged and, thus, is not in admissible form. No testimony was offered by an investigator describing efforts to locate these witnesses.

Accordingly, on the facts presented, the application to dispense with the testimony of the witnesses is denied (*see e.g. Estate of Nancy Gentilcore*, NYLJ, February 3, 2011 at 34, col 2 [Sur Ct, Kings County 2011]; *Estate of Lumishar Hunter,* NYLJ, October 14, 2009 at 40, col 6 [Sur Ct, Kings County 2009]).

In any event, were the Court to dispense with their testimony, petitioner has failed to satisfy the statutory requirements for the probate of an instrument under

such circumstance (*see* SCPA 1405).

Petitioner attempts to prove the will by the testimony of the notary on the will and decedent's accountant, both of whom testified they were present at its execution. A notary may be deemed to have acted as a witness by the Court upon a proper inquiry (see *Matter of Ryan*, 12 Misc 2d 192, 193-194; *see also Matter of Zuracino*, 148 Misc 2d 707; *Matter of Douglas*, 193 Misc 623), and a will can be admitted to probate on the testimony of one available witness (SCPA 1405 [1]; *see e.g. Estate of John Lent*, NYLJ, June 1, 2011 at 30 [Sur Ct, Queens County 2011]; *Estate of Michael J. Petrella*, NYLJ, November 1, 2006 at 21, col 3 [Sur Ct, Kings County 2006]; *Estate of Murray Pritsky*, NYLJ, February 14, 2001 at 3, col 1 [Sur Ct, Richmond County 2001]).

The pertinent facts regarding the execution are as follows:

Initially petitioner elicited testimony from decedent's accountant/financial advisor, Samper Ogle, who was acquainted with decedent's caretaker's son. He testified that he told decedent that he would obtain an attorney to prepare a will for her. After finding an attorney in Brooklyn by use of the yellow pages he co-ordinated a meeting. Ogle testified that he hoped to be paid a referral fee for the service but was unsuccessful. It appears an instrument was prepared but decedent and the attorney could not arrange a mutually convenient time for its execution. When counsel became exasperated over the situation, it was suggested that the execution could be performed in Ogle's office.

What eventually transpired was that the attorney forwarded the instrument to Ogle, who printed “two or three” copies, and explained to him, by phone, what steps should be taken to properly execute same. Ogle then undertook to get decedent to appear at his office for such execution. He further averred that he obtained two witnesses from the waiting room of a car service office, as well as a notary to act in that capacity.

Ogle further testified that the subscribing witnesses signed the instrument offered for probate prior to the decedent because “they had to leave” and, in fact, left before the decedent even signed the instrument.

The second witness produced was the notary on the instrument offered for probate, Rene Perez. Mr. Perez testified that he took identification from the two witnesses; that he knew petitioner Doreen Abdul and the decedent; that he wrote, by hand, dates into the instrument on pages 7 through 10 thereof; that the decedent signed the instrument prior to the two witnesses; and that the witnesses were present when the decedent signed the instrument. However, he also testified that he had no specific recollection whether the decedent said anything to him, or anything to anybody, on that day.

Based upon the testimony and the evidence, there is no proof that the testator requested the notary public to sign the instrument offered for probate as an attesting witness and, therefore, the requirements specified in EPTL 3-2.1 (a)(4) have not been met (*see Matter of Maset*, 25 Misc 3d 1229 [A]; *Matter of Wu*,

24 Misc 3d 668, 671).

In addition, the testimony of Perez is that decedent did not say anything to anyone that day. Based upon the testimony and evidence adduced, the Court finds that there is insufficient proof that decedent declared or published the instrument as her last will and testament (EPTL 3-2.1[a] [3]). Although there is no requirement of an express declaration so long as there is sufficient information conveyed to the subscribing witnesses that the instrument she is singing is her will (*see e.g. Matter of Becket*, 103 NY 167, 174-176; *Matter of Hedges*, 100 AD2d 586, 587), there is no evidence here that there was some meeting of minds between the testator and an attesting witness that the instrument to be signed was testamentary in character (*see Matter of Roberts*, 215 AD2d 666; *Matter of Sheehan*, 51 AD2d 645, 646).

Also, the requirements of EPTL 3-2.1 (a) (2) have not been met. Petitioner has not established by a preponderance of the credible evidence that the testator affixed her signature to the will in the presence of the attesting witnesses or acknowledged her signature to each of the witnesses (*see Matter of Levy*, 169 AD2d 923, 924; *Matter of Agar,* 88 AD2d 882, 882-883; *Estate of William Sheridan*, NYLJ, February 5, 1997 at 32, col 4 (Sur Ct, Bronx County 1997); *see also Matter of Turell*, 166 NY 330, 336-338). Although there is conflicting testimony between Ogle and Perez, the Court finds the testimony of Ogle to be forthright, sincere, credible and accurate especially compared with the testimony

of Perez whose testimony appeared to be scripted.

Finally, at the conclusion of trial, an affidavit by petitioner attempting to prove the decedent's handwriting was submitted. Although it appears that this submission was made in an attempt to prove the will pursuant to the requirements specified in SCPA 1405 (4), that effort also fails for all the reasons set forth above.

Based upon the evidence and the testimony offered at the hearing, the Court finds that the petitioner failed to establish by a preponderance of the evidence that the propounded instrument was duly executed in conformance with the statutory requirements of EPTL 3-2.1 (a).

Accordingly, the petition is dismissed.

Settle Decree.

Dated: April 24, 2015

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SURROGATE