DUTCHESS COUNTY
SURROGATE'S COURT

OCT 28 2019

FILED AND ENTERED

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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PROBATE PROCEEDING, WILL OF

FRANCESA MORRIS,

Deceased.

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DECISION AND ORDER

File No. 2019-240

HAYES, M.G., SURROGATE'S COURT JUDGE

The Court read and considered the following documents upon this motion:

	PAPERS NUMBERED
Notice of Motion	1
Affidavit	2
Exhibits	3
Memorandum of Law	4
Affirmation in Opposition	5
Exhibits	6
Memorandum of Law	7
Reply Affidavit	8
Memorandum of Law	9

BACKGROUND

Respondents Hayley Morris, Sean Morris and Ryan Morris (collectively "Respondents") move for an order, pursuant to CPLR 3211(a)(1), (7) and SCPA §102, dismissing the Amended Petition for Probate and Letters Testamentary filed on or about April 1, 2019 by petitioner Bronwen Morris.

Petitioner seeks to probate the propounded instrument, dated November 21, 2017, purporting to be the Last Will and Testament of Francesca Morris (the "will").

Decedent was married to John L. Morris, who predeceased her on January 25, 2018. Francesca and John had two children, Bronwen and Evan B. Morris. Evan Morris died on February 18, 2014. Respondents are the only children of Evan B. Morris.

The purported will names the petitioner as Executor. According to the propounded instrument, petitioner is also the sole beneficiary of both the Residuary Trust Estate under the Francesca Morris Revocable Trust, dated November 21, 2017, and the Residuary Estate.

Respondents allege that the propounded instrument was not executed in accordance with the statutory formalities required by law, including, but not limited to EPTL §3-2.1. It is undisputed that an attorney did not supervise the execution of the purported will. Respondents maintain that the propounded instrument fails to comply with EPTL §3-2.1 as the decedent did not sign the document "at the end thereof".

Respondents further state that the petitioner's filing of the Amended Petition for Probate and Letters Testamentary, and an Affidavit of Will Execution by the notary who allegedly notarized the purported will, does not cure its defective execution. Rather, Respondents assert that the notary's affidavit highlights the drastic departures from the statutory formalities of EPTL §3-2.1. Specifically, the notary signed the propounded instrument where the testator typically signs, and the decedent did not sign

any page of the instrument itself. The only place which contained the decedent's initials was the left-hand margin of the affidavit of attesting witness which the respondents' allege is not part of the will. Therefore, Respondents argue that the Amended Petition for Probate and Letters Testamentary asks the Court to ignore the strict statutory requirements of EPTL §3-2.1 and SCPA §1408, and to probate an instrument which has not been executed with the requisite formality.

Petitioner maintains that she has offered to probate the will of her mother, which was unquestionably signed and which represents her testamentary intent. Petitioner states that contrary to respondents' contentions, execution of a will on an attestation page has been recognized to be a valid execution.

DISCUSSION

Dismissal is warranted under CPLR 3211(a)(1) only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law (*see Leon v. Martinez*, 84 NY2d 83 [1994]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged as true, accord the proponent the benefit of every

possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Nonnon v. City of New York*, 9 NY3d 825 [2007]).

The question posed to this Court is whether the propounded instrument was duly executed by the decedent. It is undisputed that the document was signed by the Notary Public where the testator should have signed. In fact, the only alleged "signature" of the testator is a set of initials appearing on the lower left corner of the Affidavit of Attesting Witness.

The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with the statutory requirements (*see* EPTL §3-2.1[a]; *Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Rosen*, 291 AD2d 562 [2nd Dept 2002]).

SCPA §1408 requires the Surrogate to determine that a propounded instrument "was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint."

EPTL §3-2.1 sets for the formal requirements for the due execution of a will. It states, in relevant part:

> "....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 or, in the name of the testator, by another person in his presence and by his direction...
> (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. The testator may either sign in the presence of, or acknowledge his signature to each attesting witness separately.
(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. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will."

The Court is then left to consider, pursuant to EPTL §3-2.1(1), whether the propounded instrument was "signed at the end thereof by the testator."

EPTL §3-2.1(a)(1) "clearly mandates that the testator must sign the will 'at the end thereof' thus retaining a requisite formality which has continued for well over a century." (*Matter of Zaharis*, 91 AD2d 737, 737 [3d Dept. 1982] *aff'd* 59 NY2d 629 [1983].) "This statutory provision requiring the subscription of the name to be at the end is a wholesome one and was adopted to remedy real or threatened evils." (*id.* at 737). While this laudable goal is worthy of steadfast protection, it has also been long recognized that "[f]orm should not be raised above substance in order to destroy a will." (*Matter of Field*, 204 NY 488, 457 [1912].) Ultimately, whether the decedent's signature appears at the end of the will must be determined as a matter of law. (*id.* at 737).

Pursuant to SCPA §1406, a Self-Proving Affidavit, or as referred to herein as the Affidavit of Attesting Witnesses, may serve as evidentiary proof of a will's genuineness, the validity of its execution, the competency of the testator to make a will and evidence that the testator was not under restraint (*see In re Cookson*, 49 Misc3d 1219[A] [Sur Ct, Queens County 2015]). By definition, however, it is not an integral part of a will (*id.*). Instead, a Self Proving Affidavit merely accompanies a will (*see In re Templeton*, 116 AD3d 781 [2nd Dept 2014]).

Here, the initials of the decedent, appearing solely on an attesting affidavit does not constitute a signature "at the end" of the propounded instrument pursuant to EPTL §3-2.1(1). While wills are interpreted so as to carry out the intention of the testator, that rule cannot be invoked when construing the statute regulating their execution; as in the latter case, courts do not consider the intention of the testator, but that of the legislature (*see In re Whitney's Will*, 153 NY 259 [1897]). Thus, the Court cannot simply ignore the statutory requirement that the testator's signature be at the end of the will, so as to carry out her alleged intentions. As the decedent only initialed the Self Proving Affidavit, which is not part of the propounded instrument but merely accompanies it, probate must be denied.

Petitioner's contention that the Will should be recognized as duly executed because the decedent signed the attestation page

is without merit. While the Court recognizes that wills have been admitted to probate when a testator has signed at or near the attestation clause[1], these cases are clearly distinguishable from the facts at hand. The decedent herein did not sign at or near the attestation clause contained in the propounded instrument. Rather, her initials appeared on a Self-Proving Affidavit. A Self Proving Affidavit is not vital to a will, nor can it be seen as the natural end to any instrument offered for probate. Therefore, a signature that only appears on a Self-Proving Affidavit fails to satisfy the statutory execution requirements as a matter of law.

Based upon the foregoing, it is hereby,

ORDERED, that the Amended Petition for Probate and Letters Testamentary filed on or about April 1, 2019 is dismissed, pursuant to CPLR 3211(a)(1),(7).

The foregoing constitutes the decision and order of this Court.

Dated: October 28, 2019
Poughkeepsie, New York

ENTER

HON. MICHAEL G. HAYES, S.C.J.

[1] *Younger v, Duffie*, 94 NY 535 [1884]; *In re Rivers' Will*, 58 NYS2d 589 [Sur Ct, Westchester County 1945]; *In re Case's Will*, 126 Misc 704 [Sur Ct, Schoharie County 1926]; *In re Miller's Will*, 119 Misc 4 [Sur Ct, Westchester County 1922]; *Matter of DeHart*, 67 Misc 13 [Sur Ct, Tompkins County 1910]

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