NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF THE ESTATE OF: RONALD M. DENNER, Deceased.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION-PROBATE PART UNION COUNTY DOCKET NO.: O-3474

OPINION

Decided: February 28, 2006

Eugene Rosner, Esq., (Fink, Rosner, Ershow-Levenberg, LLC, attorney for the plaintiff, Susan Barr;

John H. Skarbnik, Esq., (Walder, Hayden & Brogan, P.A., attorney for the defendant, Iris Segal, Executrix for the Estate of Ronald M. Denner,

LYONS, P.J.Ch.

The facts underlying the present matter are as follows.

The decedent, Ronald M. Denner, died November 21, 2005. A November 1, 1989 Will was duly executed by the decedent and witnessed by two witnesses in accordance with the requirements of N.J.S.A. 3B:3-2. The November 1, 1989 Will was admitted to probate on December 6, 2005. Decedent's sister, Iris Segal, was appointed Executrix of the estate and is a beneficiary of the Will.

There are three unexecuted documents which plaintiff, Susan Barr, seeks to be admitted into probate as the decedent's Last Will and Testament. The first is an unexecuted typed Will which apparently was a form Will that has handwritten assertions and a cross-out that plaintiff alleges was prepared by the decedent. This proposed document is not executed, witnessed, notarized or dated. The second document is a

handwritten list that plaintiff alleges was prepared by the decedent which was neither signed nor dated. The third document is an unexecuted Will that was prepared by an attorney, Christopher Canada, Esq..

This matter came before the court on a motion to dismiss pursuant to Rule 4:6-2(e) by the defendant. The plaintiff submits that the decedent has three alternative documents which should be probated in lieu of the 1989 Will that was probated by the defendant, Iris Segal, Executrix of the Estate of Denner. None of the three proposed Wills had been signed by the decedent. Defendant seeks to dismiss the verified complaint for failure to state a claim because none of the documents proffered by plaintiff were executed by the decedent.

Plaintiff relies on N.J.S.A. 3B:3-3 - Writings Intended as Wills to admit the three proposed Wills to probate. New Jersey Statutes Annotated 3B:3-3 states in relevant part:

> Although a document or writing adding upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2, if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's Will; (2) a partial or complete revocation of the Will; (3) an addition to or an alteration of the Will; or (4) a partial or complete revision of the formerly revoked Will or formerly revoked portion of the Will.

Defendant argues that because none of the three proposed Wills were signed, the statute is not applicable and the claim must be dismissed. In essence, defendant asserts a per se bar to probating any document which has not been signed by the decedent. Defendant bases his position on three primary arguments.

First, defendant argues that the language of the statute, N.J.S.A. 3B:3-3, requires that a document still be executed even if it was "not executed in compliance with N.J.S.A. 3B:3-2." Defendant argues that the phrase "not executed in compliance with 3B:3-2," in N.J.S.A. 3B:3-3 requires that a document still be signed by the decedent. It is the defendant's position that other formal requirements of N.J.S.A. 3B:3-2 may be relaxed as not necessary to have a document admitted to probate, but that execution is still required. Defendant argues that if execution were not a prerequisite for obtaining relief under N.J.S.A. 3B:3-3, the statute should have been written omitting the word "executed." Defendant states that to permit an unsigned document to be probated makes the word "executed" superfluous and that no statute should have superfluous language. Defendant argues that by putting the word "executed" in the statute, it made it clear that the statute was not intended to permit unsigned documents to be probated.

The second argument advanced by defendant relies on the only reported decision in the United States involving the issue of whether a document must be executed to obtain relief under a Colorado statute based upon the Uniform Probate Code Section 2-503, the same section that N.J.S.A. 3B:3-3 is based upon. In In the Matter of the Estate of Sky Dancer, 13 P.3d 1231, 2000 Colo App. Lexis 1814 (Col. App. Div. 3, 2000), the Colorado Court of Appeals concluded by stating that under a similar statute as the one at issue, it will not allow a Will to be probated where it has not been executed at all. Both the statute adopted by New Jersey and the Colorado statute were based on the Uniform Probate Code.

The Colorado decision reviews at length the passage of the Uniform Probate Code in Colorado and the history behind it. The Colorado Court of Appeals interprets the Code

as permitting a will to be probated where there are minor deviations in the formal requisites for the execution of a will. The court goes on to state in its concluding paragraphs that in the case before them, the will was not written by the decedent in her own hand, the will was not signed by the decedent, there existed no evidence that the decedent represented to anyone, orally or in writing, that the document was her will, and there is nothing to dispel the possibility that some other person prepared or assembled the provisions of the alleged Will. In closing, the court stated that the statute is limited to those instruments which are not executed in strict compliance with the Colorado Will statute, not to those which are not executed at all.

Third, defendant argues that the comments to the Uniform Probate Code indicate that signing is still required. In particular, Defendant points to not only comments, but the underlying law review article Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Columbia Law Review 1 (1987) authored by Professor Langbein (hereinafter "the Langbein Article") which in essence states that one embarks on perilous ground when one excuses the signing requirements.

Plaintiff takes the opposite position. Plaintiff argues that the phrase "not executed in compliance with N.J.S.A. 3B:3-2," does not require a per se ban on unsigned documents. The argument is that N.J.S.A. 3B:3-2(a)(2) requires a Will to be signed. Hence, by saying a document was not executed in compliance with N.J.S.A. 3B:3-2 would admit that one of the possibilities is that it was not signed and, hence, the interpretation would allow one to probate an unsigned document. Second, plaintiff disagrees with defendant's reliance on the holding in In the Matter of the Estate of Sky

Dancer case for two reasons. The first being that the Colorado decision is not binding on this court. The second reason is that the true holding of In the Matter of the Estate of Sky Dancer was that a particular will did not meet the requirements of the statute and not that it should be interpreted as a per se rule that an unsigned document cannot be probated. Finally plaintiff points to all of the cases in the Langbein Article, as well as the comments to the Uniform Probate Code to conclude that an unsigned document can be probated.

Some background on the issue is necessary. The Langbein Article, along with others in the academic community, were used by those individuals who found the probate practice overly formal, to move for a relaxation of the rules regarding formal execution of Wills, so as to effectuate the intent of the testator and reduce litigation. Those individuals in the anti-formalism school of thought drafted Section 2-503 of the Uniform Probate Code which is virtually identical to the N.J.S.A. 3B:3-3. In the comments to Section 2-503 of the Uniform Probate Code, the authors point to the Langbein Article, and note

> [t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent. Whereas, the South Australian and Israeli Courts lightly excuse breeches of the attestation requirements, they have never excused non-compliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse non-compliance with the signature requirement.
>
> [emphasis added]

The comments go on to note that "[t]he main circumstances in which the South Australian Courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other." (emphasis added).

The Uniform Probate Code comments clearly indicate that there are classes of cases for which a will is admitted to probate and there has not been an actual signature on the will by the decedent testator. The Langbein Article itself, states that

> [f]rom the first decision to the most recent, the South Australian courts have given the dispensing power the purposive interpretation. The larger the departure from the purposes of the Wills Act formality, the harder it is to excuse a defective instrument. Breach of the peripheral presence rule, indeed of any attestation requirement, has been relatively lightly excused. By contrast, the courts have excused the testator's failure to sign his will only in extraordinary circumstances.
>
> [Langbein Article at 52.]

An application under Rule 4:6-2(e) requires the court to search in depth and with great liberality to determine if a cause of action can be gleaned from the pleadings. A reviewing court is required to search the complaint in depth to "ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 56 (App.Div. 1997) cert. granted, 152 N.J. 9 (1997), appeal dismissed as improvidently granted, 153 N.J. 45 (1998)(citing Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)); Printing Mart-Morristown v. Sharp Electronics, Corp., 116 N.J. 739, 746 (1989). The standard for deciding a motion to dismiss under R.4:6-2(e) requires "...treating all the allegations of the pleading as true and considering only whether those allegations are reasonably sufficient to establish the necessary elements of the claimed cause of action." Maxim Sewerage v. Monmouth Ridings, 273 N.J. Super. 84, 90 (1993)(citing Banks v. Wolk, 918 F.2d 418 (3rd Cir. 1990)).

With respect to the interpretation of the language of the statute, N.J.S.A. 3B:3-3, it is remedial in nature and hence should be liberally construed. Cristiani v. Pau, 195 N.J. Super. 179, 183 (Law Div. 1983); see Service Armament v. Hyland, 70 N.J. 550, 559 (1976); Singleton v. Consolidated, 64 N.J. 357, 362 (1974); Martin v. American Appliance, 174 N.J. Super. 382, 384 (Law Div.1980). To say that a document was "not executed in compliance with N.J.S.A. 3B:3-2," would imply by definition, that one of the failures could be lack of signature for N.J.S.A. 3B:3-2(a)(2) requires a signature. While the language may have been clearer by simply stating "not in compliance with N.J.S.A. 3B:3-2." It could also have been clearer if it wished to require a signature in all cases by explicitly saying so.

Looking to the comments to the Uniform Probate Act, there is reference to situations in which failure to sign a will have resulted in the probate of the Will. Whether there may be fact patterns beyond the reciprocal husband and wife will situation, remains to be seen. Other possible scenarios are, for example, an individual about to sign his or her Will in front of the proper witnesses and his or her attorney could suffer a heart attack or stroke thereby immediately rendering the individual incapable of signing his or her Will after announcing the document to be his or her will and asking all present to witness his or her execution. In that situation, it can be argued that the individual had every intent that the document be his or her will.

While, the court takes note of the Colorado decision as shedding light of the particular issues involved in the present case, the Colorado decision is not binding on a New Jersey court. Furthermore, upon reading the Colorado decision, one could conclude

that the closing line of the opinion was more a statement of pique, than one of legal principle.

While defendant attempted to distinguish the unsigned reciprocal will cases cited in the Langbein Article which permitted probate of an unsigned document by pointing out that even in those cases where a signature was not required, the court in effect took the husband's signature and reformed it or transposed it into the wife's and vice versa, and that there had been at least a signing. The court views that analysis as attempting to rationalize in legalistic terms what the statute frames more as a question of proof of intent.

Therefore, for the reasons set forth above, the court denies the motion to dismiss by the defendant.