In the Manhattan Probate proceeding regarding the Last Will and Testament of Leslie Ann Mandel, I successfully represented the decedent's step-pson and brother-in-law who were seeking to have the Will admitted to probate. The decedent had signed her Will under an attorney's supervision and in the presence of attesting witnesses. However, at some time after she executed the Will, the decedent made handwritten changes to the typewritten provisions of the Will. The changes were not attorney supervised and not done in front of witnesses and not made in accordance with the New York statutory requirements for executing a Will. These legal requirements are set forth in Estates, Powers and Trusts Law Section 3-2.1 entitled "Execution and attestation of wills; formal requirements.

The decedent's sisters had filed Objections to the Will and claimed that the handwritten changes made by the decedent had revoked the Will. The statutory requirements to revoke a Last Will are set forth in Estates, Powers and Trusts Law Section 3-4.1 entitled "Revocation of wills; effect on codicils".

The sisters claimed that the handwritten changes on the Will essentially obliterated the Will thus satisfying one of the criteria set forth in the revocation statute. The Will left the decedent's estate primarily to the decedent's step-son. However, if the Will was found to have been revoked, the decedent would have been deemed to have died intestate and her estate would have been distributed to the sisters as her next of kin.

The decision of Surrogate Nora S. Anderson dated August 15, 2019 in favor of my clients dismissed the sisters' Objections and admitted the Will to probate.

The decision provides that the handwritten changes to the Will are to be ignored and the provisions of the Will that appear in its original typed and unaltered form control the disposition to beneficiaries. Thus, the estate is to be paid to the step-son.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Probate Proceeding, Will of

LESLIE ANN MANDEL,
a/k/a LESLIE ANN MANDEL-HERZOG,
a/k/a LESLIE MANDEL,

File No. 2015-2454/C

Deceased.

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A N D E R S O N , S .

Two motions are before the court in this contested proceeding for probate of a propounded instrument, dated January 6, 2006 (the "will"), in the estate of Leslie Mandel. Petitioners, decedent's stepson and brother-in-law, move for summary judgment (CPLR 3212) seeking dismissal of the sole objection to probate on grounds that the will was revoked by an act of either obliteration or cancellation of its dispositive provisions (EPTL 3-4.1[a][2]). Although the filing of a motion for summary judgment stays discovery until the motion is determined by the court (CPLR 3214[b]), objectants, decedent's two sisters ("A.M." and "T.M.") and sole distributees, have nonetheless moved to compel petitioners to appear for depositions (CPLR 3124).

Decedent died on June 23, 2015, at the age of 69, leaving an estate valued at $5 million. Decedent had no children, and her spouse predeceased on May 26, 2010. A guardian ad litem was appointed for the stepson's two minor children, who are

contingent remainderpersons of a trust created under Article FOURTH which also provides for decedent's 32 pet birds, as well as her dog and her cat. The guardian ad litem has filed a report in support of petitioners' motion for summary judgment and in opposition to objectants' motion to compel.

It is undisputed that at the time decedent executed her will, there were no handwritten markings on the document other than the signature of decedent, the signatures and addresses of the attesting witnesses, and the date of the will, which was handwritten by the attorney-drafter. The original unmarked will leaves the bulk of the estate to decedent's spouse, or, if he predeceased her, to her stepson. When the will was offered for probate, there were handwritten markings on nine of its 27 typewritten pages and within seven of its 15 articles. The handwritten markings generally consist of lines drawn through the name of decedent's spouse in the majority of the provisions where his name appears. Lines were also drawn through the names of decedent's stepson, the stepson's spouse, and their children, in all provisions where their names appear. The names of A.M., her son, or decedent's brother-in-law (co-petitioner here) are handwritten above or below the stricken language. For the most part, decedent's initials appear next to the handwritten markings.

With respect to the dispositive provisions of the will, lines are drawn through the names of the remainderpersons of the trust for decedent's pets, the names of the beneficiaries of specific bequests of decedent's businesses (Articles FIFTH and SIXTH), and the named beneficiaries in certain subdivisions of the residuary clause (Article SEVENTH[A], [B], [C]). In contrast, however, the bequest of tangible personal property (Article THIRD), the dispositive provision for the primary beneficiaries of the trust for decedent's pets, and the provision for the ultimate contingent residuary beneficiaries (Article SEVENTH[D]) appear in their original, unmarked state. Also unmarked are decedent's signature, the attestation clause, and the signatures and addresses of the three attesting witnesses.

EPTL 3-4.1 sets forth the procedures for the revocation of wills. Courts "have been as unyielding in demanding strict compliance with the requirements of EPTL 3-4.1 for the revocation of a will as they have in demanding compliance with the requirements of EPTL 3-2.1 for the execution of a will" (*Matter of Charitou*, 156 Misc 2d 952 [Sur Ct, Bronx County 1993]). Indeed, "[a] testator executing a will must satisfy a fair number of strictly construed formal requirements (EPTL 3-2.1) . . . but a testator revoking a will also must adhere to some formalities" (Margaret Valentine Turano, Practice Commentaries, McKinney's Cons Laws of NY, EPTL 3-4.1).

EPTL 3-4.1(a)(2)(A)(i) provides that a revocation, "if intended by the testator, may be effected . . . by . . . [a]n act of burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction performed by . . . [t]he testator." In order to effectuate a revocation by obliteration or cancellation, there must be the concurrence of an act of revocation and an intent to revoke (*see Matter of Akers*, 74 AD 461 [1st Dept 1902]; *Matter of Carcaci*, NYLJ, Mar. 12, 2002, at 17, col 1 [Sur Ct, Kings County]). As the Court of Appeals has observed, "Intent alone will not suffice. It must be 'consummated by some of the acts specified in the statute . . .'" (*Matter of Tremain*, 282 NY 485 [1940]; *see also Matter of Tempone*, NYLJ, May 31, 2002, at 18, col 5 [Sur Ct, NY County]).

Numerous courts have held that whether markings on an instrument constitute a sufficient act under the statute is a preliminary matter of law for the court to decide (*Matter of Tremain*, 169 Misc 549 [Sur Ct, Westchester County 1938], *affd* 257 AD 996 [2d Dept 1939], 282 NY 485 [1940]); *Matter of Christensen*, NYLJ, Mar. 4, 1982, at 13, col 3 [Sur Ct, Queens County 1982]; *Matter of Macomber*, 192 Misc 391 [Sur Ct, Madison County 1948]; *see also Matter of Broggelwirth*, 283 AD 727 [2d Dept 1954]).

To constitute a sufficient act, the markings must affect the entire will or a "vital part" thereof (*see Matter of Tremain*, 257 AD 996 [2d Dept 1939], *affd* 282 NY 485 [1940]; *Matter of Baker*,

NYLJ, Oct. 28, 1994, at 29, col 6 [Sur Ct, NY County]). The precedents have recognized "vital" as the signature of the testator or of an attesting witness (*see Matter of Tremain*, 257 AD 996 [2d Dept 1939], *affd* 282 NY 485 [1940]); *Matter of Tempone*, NYLJ, May 31, 2002, at 18, col 5 [Sur Ct, NY County]; *Matter of Sax*, 25 Misc 2d 576 [Sur Ct, NY County 1960]), as well as "each and every dispositive provision of [the] will" (*Matter of Lavigne*, 76 AD2d 975 [3d Dept 1980]; *Matter of Tempone*, NYLJ, May 31, 2002, at 18, col 5 [Sur Ct, NY County]).

It is clear that the markings here do not affect the entire will or a "vital part" thereof, as that phrase is interpreted by case law. Not "each and every" dispositive provision has been obliterated. It is indisputable that two clearly dispositive provisions remain unmarked: the Article FOURTH bequest of $100,000 in trust for the primary benefit of decedent's pets, and the Article SEVENTH(D) alternative provisions for the residuary and any ultimate remainder of a testamentary trust.

Objectants' suggestion that the unmarked portion of the Article FOURTH trust is unimportant, or, as stated at oral argument, "irrelevant," is misguided. A trust for a testator's pets is a valid disposition (*see* EPTL 7-8.1), and the court therefore cannot simply disregard the provision. Further, in no way have objectants attempted to dispute that the ultimate contingent disposition of the estate was left unchanged (*see*

Matter of Baker, NYLJ, Oct. 28, 1994, at 29, col 6 [Sur Ct, NY County]).

Based upon the foregoing, the court concludes that there has not been a sufficient act of obliteration on the face of the will to effectuate a revocation.

Objectants contend that certain extrinsic proofs (including affidavits from several individuals, e-mails between decedent and A.M., and a written health care directive executed by decedent in 1994) establish that decedent intended the markings on the will to effect a revocation. According to objectants, such evidence shows that, following the death of her husband, decedent no longer wished to benefit the stepson from whom she had become estranged, and instead wished to benefit A.M., with whom she had reconciled certain differences.

An inquiry into a testator's actual intent to revoke cannot be made "unless and until" the court decides that the threshold issue of compliance with statutory formalities has been satisfied (*Matter of Tremain*, 257 AD 996 [2d Dept 1939], *affd* 282 NY 485 [1940]; *see also Matter of Macomber*, 192 Misc 391 [Sur Ct, Madison County 1948]; *Matter of Semler*, 176 Misc 687 [Sur Ct, Richmond County 1941]). Thus, proof of decedent's extrinsic expressions of an intent to revoke cannot be heard where, as here, the markings on a propounded instrument are insufficient to constitute an act of revocation under the statute (*Matter of*

Tremain, supra). Since no such act has been shown to have occurred, the court cannot consider objectants' extrinsic proofs of decedent's intent to revoke.

Further, objectants have failed to show any circumstance that would make the ruling in *Matter of Baker* (NYLJ, Nov. 24, 1992, at 35, col 3 [Sur Ct, NY County]) relevant here (extrinsic evidence to be considered to determine how much of the instrument in question was obliterated, including whether inconsistent markings, striking out and rewriting the name of the residuary beneficiary, constituted obliteration)(*cf. Matter of Tier,* 3 Misc 3d 587 [Sur Ct, NY County 2004][extrinsic evidence may be considered to determine whether an alteration was made before or after the execution of the instrument for purposes of establishing the validity of the alteration]).

Objectants' invocation of the presumption of intent to revoke is misplaced. Such presumption is available only if and where, at the threshold stage of the revocation question, sufficient obliteration has been established and the question of actual intent to revoke has been reached (*see Matter of Baker,* NYLJ, Oct. 28, 1994, at 29, col 6 [Sur Ct, NY County]). In view of the insufficiency of the formalities as to revocation in this case, the presumption is unavailable to objectants for purposes of an issue as to actual intent.

Similarly, since an inquiry into decedent's actual intent is foreclosed by the insufficiency of formal signs of revocation, there is no merit to objectants' contention that summary determination against them would be premature in the absence of discovery as to decedent's actual intent.

Based on the foregoing, petitioners' motion for summary determination is granted in all respects, except with respect to their request for dismissal of the "objections" of A.M.'s son, who never in fact filed formal objections. Objectants' motion to compel depositions is denied, and their petition for letters of administration is dismissed. The will shall be admitted to probate in its original form (*Matter of Tremain*, 169 Misc 549 [Sur Ct, Westchester County 1938], *affd* 257 AD 996 [2d Dept 1939], 282 NY 485 [1940]), and letters testamentary shall issue to petitioners. Preliminary letters testamentary heretofore issued to petitioners are hereby revoked.

Settle decree.

Dated: August 15, 2019

NSA

SURROGATE